Supreme Court, U.S.
FILED

94-1745 MAR 29 1995

OFFICE OF THE CLERK

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

IN RE FRANCIS T. MANDANICI,
PETITIONER

V.

JUDICIAL COUNCIL
OF THE DISTRICT OF COLUMBIA CIRCUIT,
RESPONDENT

PETITION FOR A WRIT OF MANDAMUS TO THE JUDICIAL COUNCIL OF THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF MANDAMUS

FRANCIS T. MANDANICI
PETITIONER PRO SE, AND
COUNSEL OF RECORD
180 Pearsall Place
Bridgeport, Ct. 06605
(203) 368-1775

A. QUESTION PRESENTED FOR REVIEW

In light of the previous prediction by a member of this Court that a "politically partisan" judge might select an independent counsel "antagonistic to the administration", see Morrison v. Olson, 487 U.S. 654, 729-730(1988)(Scalia, J., dissenting), and in view of a public statement by five past presidents of the American Bar Association that there was a "possibility that ... political considerations may have influenced the decision of the Special [Division] to replace Robert Fiske with Kenneth Starr as the independent counsel to investigate the so called Whitewater matter", should this Court grant the relief of mandamus to direct the Judicial Council of the Circuit on which Judge David Sentelle sits to: 1) address and resolve a formal judicial complaint that Judge Sentelle should have recused himself from sitting on the Special Division when it decided the Fiske-Starr matter since Judge Sentelle's old friend and lunch partner, Senator Lauch Faircloth, led the drive to remove Fiske, and or 2) refer the above complaint to the national Judicial Conference pursuant to 28 U.S.C., Sec. 372 (c) (7) (B) (ii)?

B. LIST OF PARTIES

The petitioner is Francis T. Mandanici, and the respondent is the Judicial Council Of The District Of Columbia Circuit, whose members who voted in this matter are Laurence H. Silberman, Acting Chief Judge of the United States Court of Appeals For The District of Columbia Circuit, Stephen F. Williams, Karen LeCraft Henderson, Judith W. Rogers, and David S. Tatel, Circuit Judges; and John Garrett Penn, Chief Judge of the United States District Court For the District of Columbia, Joyce Hens Green, Thomas Penfield Jackson, Stanley Sporkin, Royce C. Lamberth, and Gladys Kessler, District Judges.

C-1 TABLE OF CONTENTS

A.	Question Presented For Review	1
B.	List Of Parties	2
C-1	Table Of Contents	3
C-2	Table Of Authorities	4
D.	Reference To The Official And Unofficial Reports	7
E.	Statement Of The Grounds On Which Jurisdiction Is Invoked	7
F.	Relevant Statutes	7
G.	Statement Of The Case	8
I.	Basis For Federal Jurisdiction In The Court Of First Instance	14
J.	Argument	14
	1. Introduction	14
	2. Mandamus	16
	3. Conclusion	28
K.	Appendix	1a

C-2 TABLE OF AUTHORITIES

CASES

Allied Chemical Corp. v. Daiflon Inc.
449 U.S. 33, 101 S. Ct. 188,
66 L. Ed. 2d 193(1980) 16, 17, 20

Bankers' Life & Casualty Co. v. Holland
346 U.S. 379, 74 S.Ct. 145,
98 L. Ed. 106(1953) 16, 24

Beisler v. C.I.R.
814 F.2d 1304(9th Cir., 1987) 21

In Re Cement Antitrust Litigation(MDL No. 296)
688 F.2d 1297(9th Cir., 1982)
affirmed, Arizona v. U.S. District Court For The
District Of Arizona, 459 U.S. 1191,
103 S. Ct. 1173, 75 L. Ed. 2d 425(1983) 21

Chandler v. Judicial Council Of The Tenth Circuit
398 U.S. 74, 90 S. Ct. 1648,
26 L. Ed. 2d 100(1970) 17, 19

Crandon v. United States
494 U.S. 152, 110 S. Ct. 997,
108 L. Ed. 2d 132(1990) 20

Federal Election Commission v. Mass. Citizens For Life
769 F.2d 13(1st Cir., 1985), affirmed, 479 U.S. 238,
107 S. Ct. 616, 93 L. Ed. 2d 539(1986) 27

Federal Land Bank Of St. Paul v. Bismark Lumber Co.
314 U.S. 95, 62 S. Ct. 1,
86 L. Ed. 65(1941) 27

Hastings v. Judicial Conference Of The United States
829 F.2d 91(D.C. Cir., 1987),
cert. den., 485 U.S. 1014, 108 S. Ct. 1487,
99 L. Ed. 2d 715(1988) 15, 25

In Re International Business Machines Corp.
618 F.2d 923(2nd Cir., 1980) 23

LaBuy v. Howes Leather Co.
352 U.S. 249, 77 S. Ct. 309,
1 L. Ed. 2d 290(1957) 24

Liljeberg v. Health Services Acquisition Corp.
486 U.S. 847, 108 S. Ct. 2194,
100 L. Ed. 2d 855(1988) 10, 12, 26

Marbury v. Madison
1 Cranch 137, 2. L. Ed. 60(1803) 17

Matter Of Dyke
943 F.2d 1435(5th Cir., 1991) 20

Morrison v. Olson
487 U.S. 654, 108 S. Ct. 2597,
101 L. Ed. 2d 569(1988) 1, 14

In Re School Asbestos Litigation
977 F.2d 764(3rd Cir., 1992) 19

Thermtron Products Inc. v. Hermansdorfer
423 U.S. 336, 96 S. Ct. 584,
46 L. Ed. 2d 542(1976) 19

Union Carbide Corp. v. U.S. Cutting Service
782 F.2d 710(7th Cir., 1986) 24

United States v. Balistrieri
779 F.2d 1191(7th Cir., 1985), cert. den.,
DiSalvo v. United States, 475 U.S. 1095,
106 S. Ct. 1490, 89 L. Ed. 2d 892(1986) 23

United States Dept. Of Energy v. Crocker
629 F.2d 1341(Temporary Emergency
Court of Appeals, 1980) 19

Valenzuela-Gonzalez v. United States District Court
For The District Of Arizona
915 F.2d 1276(9th Cir., 1990)

In Re Virginia Electric & Power Co.
539 F.2d 357(4th Cir., 1976) 24

STATUTES

28 U.S.C., Sec. 372 passim

28 U.S.C., Sec. 455 passim

28 U.S.C., Sec. 1651 passim

CODES

American Bar Assiciation Code Of Judicial Conduct
Canon 3 passim

BOOKS

Modern Legal Ethics, by Charles W. Wolfram,
West Publishing Co., 1986 26

D. REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS

There are no official or unofficial reports. The case below was entitled In The Matter Of A Charge Of Judicial Misconduct Or Disability, Judicial Council Complaint No. 94-8, and was decided by the Judicial Council Of The District Of Columbia Circuit. The ruling of the Judicial Council is reproduced in the Appendix and also is attached hereto pursuant to Rule 20.3.

E. STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKED

1. The order of the Judicial Council was entered on December 30, 1994. Reference is made to Rule 20.2 which states that a petition for a writ of mandamus shall be in the form of a petition for a writ of certiorari. Rule 13.1 requires a petition for a writ of certiorari to be filed within 90 days of the judgment sought to be reviewed. This present petition is being filed within 90 days of the Order of the Judicial Council.

2. There was no request for a rehearing nor for an extension of time.

3. This matter does not involve a cross petition.

4. The jurisdiction of this Court is invoked pursuant to the All Writs Act, 28. U.S.C., Sec. 1651.

F. RELEVANT STATUTES AND CODES

The statutes involved in this case are 28 U.S.C., Sec. 372, regarding judicial misconduct, and 28 U.S.C., Sec. 455, regarding recusal. Also, the case involves Canon 3 of the American Bar Association's Code Of Judicial Conduct concerning recusal. These matters are set forth in the Appendix.

G. STATEMENT OF THE CASE

The petitioner, Francis T. Mandanici, on September 2, 1994 filed Judicial Complaint No. 94-8 (App. 28a-37a) with the Clerk's Office of the United States Court of Appeals for the District of Columbia Circuit. The complaint was filed pursuant to the Judicial Conduct And Disability Act, 28 U.S.C., Sec. 372 (c) (1)(App. 47a) and the Rules of the Judicial Council For The District Of Columbia Circuit Governing Complaints Of Judicial Misconduct Or Disability. The complaint(App. 31a-32a) asserted the following facts:

> "Judge David Sentelle is a judge of the United States Court of Appeals for the District of Columbia Circuit. According to press reports, Judge Sentelle has publicly stated that he and Senator Lauch Faircloth (R-NC) and Senator Jesse Helms (R-NC) are 'old friends' whom he lunches with 'from time to time'. (Washington Post, hereafter referred to as WP, Aug. 12, 1994 PA24). According to press reports, Judge Sentelle and Senator Faircloth 'share roots in North Carolina Republican politics'. (WP, Aug. 12, 1994, PA1)., and Judge Sentelle 'was active in local Republican circles while a lawyer serving as the chairman of the Republican party in Mecklenburg County, N.C'.(New York Times, hereinafter referred to as NYT, Aug. 9, 1994 PA14). Friends and critics of Judge Sentelle recall him as an 'ideologically committed leader of the conservative wing of the Republican Party.' (NYT, Aug. 17, 1994, PA1). Judge Sentelle was a 'protege of Senator Jesse Helms' (NYT, Aug. 9, 1994, PA14), a 'political ally of (Senator) Helms', 'is close to conservative Sen. Jesse Helms ... (who) backed Sentelle's appointment to the appeals court.' (WP, Aug. 7, 1994, pp A1, A6)."
>
> "As a member of the Court of Appeals for the District of Columbia Circuit, Judge Sentelle was appointed to sit on the three judge panel entitled the Division For The Purpose Of Appointing Independent Counsel. On August 5, 1994, Judge Sentelle and the two other members of that panel named Kenneth Starr as the Independent Counsel to investigate what is commonly known as the Whitewater scandal involving the Madison Guaranty Savings and Loan. All three members of that panel decided to name Mr. Starr as the Independent Counsel rather than to keep Robert Fiske who Attorney General Janet Reno had earlier appointed as an

Independent Counsel to investigate the matter. That appointment was made in January, 1994, pursuant to a Justice Department regulation which the Attorney General utilized since no independent counsel law was in effect at that time."

"According to press reports, Senator Faircloth 'led (the earlier) efforts to remove special counsel Robert B. Fiske ... (and had) condemned Fiske's early findings' (WP, Aug. 12, 1994, P A1) 'which had generally pleased the (Democratic) White House'. (NYT, Aug. 17, 1994, P B8). Prior to Fiske's removal, Senator Faircloth 'wrote to Attorney General Janet Reno July 1 charging that Fiske's professional ties to former White House Counsel Bernard Nussbaum presented at least an apparent conflict of interest that rendered him unfit for the job. That letter was followed by a July 13 appeal to Sentelle from 10 conservative Republican congressman who asked that Fiske be replaced'. (WP, Aug. 12, 1994, P A1). That appeal was in the form of a letter and Judge Sentelle recently 'refused to comment ... on whether he had read the letters or what role - if any- they played in the panel decision', and when asked if the letters 'were in the public court file', he refused to respond in an intelligent manner but rather told the inquirer that he 'believed English was your mother tongue'. (WP, Aug. 7, 1994, P A7). A search of the public file prior to August 7 did not disclose the letter. (WP, Aug. 7, 1994, P A7). A later press report of August 12, 1994 reveals that '(u)ntill this week, when news organizations appealed to Sentelle's panel, letters it received regarding Fiske -- including the congressional appeal -- were not included in a public court file'. (WP, Aug. 12, 1994, P A24)."

"In addition to letters to Judge Sentelle which were not disclosed, press reports also reveal that Judge Sentelle confirmed that he had a previously undisclosed lunch with Senator Faircloth and Senator Helms in 'mid July, a time when (he) was considering whether Fiske would be permanently appointed the independent counsel in the Whitewater case'. (WP, Aug. 12, 1994, P A1). Judge Sentelle recently issued a written statement that to 'the best of my recollection nothing in these discussions concerned independent counsel matters'.

(WP, Aug. 12, 1994, P A24). At the lunch, the three 'old friends' talked about 'western wear, old friends, and prostate problems'. (WP, Aug. 12, 1994, P A24)" (App. pp. 31a -32a).

In the Complaint, the petitioner requested that a "special committee be appointed pursuant to 28 U.S.C. Sec. 372 (c) (1) and (4) to formally investigate whether Judge Sentelle has 'engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts'". (App. 32a). The petitioner specifically requested

> "1) an investigation of all ex parte communications ... and 2) an investigation of the relationship between Judge Sentelle and his 'old friend' Senator Faircloth who led the campaign to replace Fiske since that relationship should have required Judge Sentelle to **recuse** himself from the panel which decided to replace Fiske. If Judge Sentelle was close enough to Senator Faircloth to share personal detaiis like prostate problems with him over lunch, then he was close enough to Senator Faircloth to require **recusal** in a matter in which Senator Faircloth had a substantial personal and political interest." (App. 32a - 33a) (emphasis added).

The petitioner specifically stated that Judge Sentelle should have recused himself pursuant to Canon 3C of the A.B.A. Code of Judicial Conduct, and the recusal statute, 28 U.S.C., Sec. 455 (a) (App 34a - 35a). The petitioner also cited Liljeberg v. Health Services Acquisition Corp. 486 U.S. 847, 865, 108 S.Ct. 2194, 100 L. Ed. 2d 855 (1988) and its holding that the "very purpose of [the recusal statute,] Section 455 (a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible."(App. 35a).

The petitioner did not ask the Judicial Council to enter

> "a court order that Judge Sentelle reopen the Fiske-Starr matter since the Judicial Council does not have the power to enter that order. Rather [the petitioner requested that] pursuant to 28 U.S.C., Sec. 372(c)(6)(B), the Judicial Council should 1) ask Judge Sentelle to 'voluntarily retire' from the panel concerning independent counsels, 2) order that no further cases be assigned to Judge Sentelle for a certain period of time, 3) publicly censure or reprimand Judge Sentelle."(App. 36a)

In a letter to Judge Edwards, dated October 17, 1994, which supplemented the complaint, the petitioner referred to and attached a public statement of five past presidents of the American Bar Association (App. 38a). The five past presidents publicly proclaimed that they were "concerned over the possibility that, as reported in the press, **political considerations** may have influenced the decision of the Special Court to replace Robert Fiske with Kenneth Starr as the independent counsel to investigate the so called Whitewater matter"(App. 41a - 42a).(emphasis added).

On November 1, 1994, the Honorable Harry T. Edwards, as Chief Judge of the Court of Appeals for the District of Columbia Circuit and pursuant to his authority under 28 U.S.C., Sec. 372 (c)(3), dismissed the Complaint, No. 94-8, and two other later but similar Complaints filed by other citizens against Judge Sentelle concerning the Fiske-Starr matter. (App. 11a - 27a). In a written opinion, Judge Edwards initially noted that the present petitioner had raised two distinct legal issues. Judge Edwards stated that the present petitioner in Complaint No. 94-8,

> "argues that the subject judge's meeting with Senators Helms and Faircloth, and his receipt of and failure to disclose the congressional correspondence, constituted ex parte communications in violation of Canon 3 (A) (4) of the Code Of Conduct For United States Judges. Complainant **also** asserts that the subject judge is required to **recuse** himself from participation in the Whitewater 'proceeding', citing Canon 3 (C) (1) and 28 U.S.C., Sec. 455 (a) (1988) [which states that a] judge should **disqualify** himself from [any] **proceeding** in which his impartiality might reasonably be questioned" (App. pp. 15a - 16a) (emphasis added).

However, Judge Edwards only ruled on the ex parte communication issue and refused to resolve the recusal issue. Judge Edwards ruled that Judge Sentelle was acting under the Appointments Clause of Article II, Section 1, of the Constitution where he sat on the panel which appointed Mr. Starr and thus it was proper for Judge Sentelle to have ex parte communications. Judge Edwards ruled that only when a judge presides in "an adversarial judicial proceeding under Article III" of the Constitution does the "prohibition against ex parte contacts embodied in Canon 3 (A) (4)" apply. (App. 21a - 22a). Judge Edwards stated that the

"appointment functions of the Special Division certainly do not constitute adversarial proceedures .... It makes little sense to think that an authority acting pursuant to the appointments clause of Article II might be forbidden from consulting with others regarding candidates for appointment. It is hard to imagine how anyone would go about the task without **seeking** advice." (App. 22a) (emphasis added).

Judge Edwards concluded that the complaint "failed to allege conduct prejudicial to the effective and expeditious administrationn of the business of the courts. Accordingly, the complaints shall be dismissed for failure to conform to 28 U.S.C., Sec. 372 (c) (1)." (App. 27a).

Unfortunately, other than as mentioned earlier concerning his introductory remarks, Judge Edwards never confronted nor ever referred to the Canon on recusal, Canon 3 (C) (1), nor the statute on recusal, 28 U.S.C., Sec. 455 (a). Also, he never mentioned the leading case on recusal Liljeberg v. Health Services Acquisition Corp, supra ,486 U.S. 847, nor did he mention any other case or law concerning recusal. The recusal issue was never addressed nor resolved. Rather than directly confronting the recusal statute, 28 U.S.C. Sec. 455 (a)(App. 54a) which states that "any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned" (emphasis added), Judge Edwards merely concluded that the petitioner had a "pristine...albeit arguably naive...view of the appointment process." (App. 27a).

On November 30, 1994, the petitioner timely filed a Petition For Review (App. 43a - 46a) to the Judicial Council for the District of Columbia Circuit pursuant to 28 U.S.C., Sec. 372 (c) (10)(App. 51a) and Rule 5 of the Rules of the Judicial Council For The District Of Columbia Circuit Governing Complaints Of Judicial Misconduct Or Disability. That petition focused on the fact that "Judge Edwards refused to address the second but most important issue in the Complaint concerning recusal" (App. 44a). The petitioner asserted that the recusal requirement set forth in Canon 3C applied to "judges regardless of whether they are acting in an adjudicative or administrative capacity." (App. 45a). The petitioner also referred to the recusal statute, 28 U.S.C., Sec. 455 (a), and asserted that it applies to all judicial proceedings without exception. (App. 45a)

The Judicial Council on December 30, 1994, affirmed the Order of Judge Edwards dismissing the complaint. (App. 2a - 3a). That ruling by 11 members of the Judicial Council was in the form of an Order by Laurence H. Silberman, Acting Chief Judge, who did not provide any further written statement. However, two judges, Henderson, Circuit Judge, and Green, District Judge, filed Concurring Statements, while two other judges, Tatel, Circuit Judge, and Kessler, District Judge, filed Separate Statements. (App. 4a - 9a). The concurring statements did not address the recusal issue. (App. 4a - 5a) Nor did the separate statements address the recusal issue on the merits. Judge Tatel in his Separate Statement dissented from the Order affirming the dismissal of the complaint, and asserted that the complaint should not have been dismissed but rather a special committee should have been appointed which could have referred the complaint to the national Judicial Conference pursuant to 28 U.S.C., Sec. 372 (c) (7) (B). Judge Tatel stated that the Special Division which appoints independent counsels is a national court and that any actions of its members should not be scrutinized by a local circuit's Judicial Council but by the national Judicial Conference. Judge Tatel also stated that the Code of Judicial Conduct applies to all activities of Article III Judges, including when acting pursuant to the appointment clause of Article II and "(w)hile expressing no view on the merits of (the) complaints ... I do not agree that the circumstances alleged could never constitute a violation of ethical or legal standards." (App. 5a - 8a).

Judge Kessler in her Separate Statement agreed with Judge Tatel's conclusion that the Special Division is a national court and complaints against its members should be certified to the national Judicial Conference. Judge Kessler also agreed with Judge Tatel that "Article III judges are always subject to the appearance of impropriety standard whether they are exercising Article II or Article III powers." (App. 8a). Judge Kessler further noted that

> "the complaints raise significant issues affecting the public's perception of the impartiality and neutrality of the judiciary. The manner in which we now choose to resolve those issues will have long-range implicataions for the future. The precedent set by this Circuit affects not only our sister Circuits throughout the country, but may well influence Congressonal thinking..." (App. 8a - 9a)

Thus neither the Order of the Judicial Council, nor the Concurring Statements nor even the Separate Statements, ever address the issue of recusal. The term recusal is never mentioned, and the recusal statute, 28 U.S.C. Sec. 455 (a), and the ABA Canon on recusal, Canon 3 C(1), are never mentioned.

Thus the issue of recusal was never addressed nor resolved on the merits by Judge Edwards or the Judicial Council. Although the recusal issue was never addressed, the formal Notice accompanying the Order of the Judicial Council stated that the "order is final and is not reviewable." (App. 2a).

I. BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE.

The complaint was originally filed with the United States Court of Appeals for the District of Columbia Circuit and considered by the chief judge of that circuit pursuant to 28 U.S.C., Sec. 372 (c). After the complaint was dismissed by the chief judge, the petitioner timely filed a Petition For Review with the Judicial Council of that circuit pursuant to 28 U.S.C., Sec. 372 (c) (10). The Judicial Council affirmed the dismissal.

J. ARGUMENT

1. Introduction

In what might be described as the Scalia prohesy, it was noted in 1988 that an

> "independent counsel is selected, and the scope of his or her authority prescribed, by a **panel of judges**. What if they are **politically partisan**, as judges have been known to be, and select a prosecutor **antagonistic** to the administration, or even to the particular individual who has been selected for his special treatment? **There is no remedy for that, not even a political one.** Judges, after all, have life tenure, and appointing a surefire enthusiastic prosecutor could hardly be considered an **impeachable** offense. So if there is anything wrong with the selection, there is **effectively no one to blame**." Morrison v. Olson, 487 U.S. 654, 729-730, 108 S.Ct. 2597, 2639, 101 L. Ed. 2d 569 (1988) (Scalia, J., dissenting) (emphasis added).

Justice Scalia was correct in his factual prediction and also in his his legal observations that Congress could not impeach such a partisan judge and a defendant has no remedy in court concerning being chosen for prosecution by a prosecutor chosen by such a partisan judge. However, there is a formal disciplinary procedure in which such a judge can be 'effectively...blame(d)' for his partisan conduct. The Judicial Conduct and Disability Act, 28 U.S.C., Sec. 372,

> "is a supplement to, but not a substitute for, the seldom used process of impeachment by Congress of a member of the judiciary as set forth in Article I of the Constitution of the United States and is designed to deal with those matters which do **not rise to the level of impeachable offenses"** S. Rep. No. 362, 96 Cong. 1st Sess. 9 (1979), reprinted in 1980 U.S. Code Cong. & Ad. News, 4315, 4317 (emphasis added).

The statute provides disciplinary procedures for "conduct prejudicial to the effective and expeditious administration of the business of the courts," 28 U.S.C., Sec. 372 (c) (1)(App. 47a), and it has been held that the statute covers "conduct prejudicial to the administration of justice that brings the judicial office into **disrepute**." Hastings v. Judicial Conference of U.S., 829 F2d 91, 106 (D.C. Cir., 1987), cert. den., 485 U.S. 1014, 108 S.Ct. 1487, 99 L. Ed. 2d 715(1988)(emphasis added). The legislative history states that "the standard announced in the Act should be informed by the Code of Judicial Conduct of the American Bar Association ... and congressional enactments concerning judicial conduct." Id., 106, 1980 U.S. Code Cong. & Ad. News, 4323.

Although as Justice Scalia mentioned, a defendant prosecuted by an independent counsel chosen by partisan judges has no remedy in court, an ordinary citizen who is a non party does have a right to file a formal complaint against such a judge and actually has better standing to file such a complaint than such a defendant. The complaint must be truly disconnected from any court ruling involving an actual court case. The Judicial Conduct and Disability Act "is not designed to assist the disgruntled litigant who is unhappy with the result of a particular case." S. Rep., No. 362, 96th Cong., 1st Sess. 9 (1979), 1980 U.S. Code Cong. and Ad. News, 4322. A person who is indicted by Mr. Starr and who attempts to raise this matter as a possible defense in his case could not raise it in a judicial complaint since the statute clearly states that a complaint must be dismissed if it is "directly related to the merits of a

decision or procedural ruling." 28 U.S.C. Sec. 372 (c) (3) (A) (ii)(App. 47a). The present complaint was filed long before Mr. Starr chose to indict anyone and is not directly related to any potential or possible motion or ruling.

Thus a citizen who is not involved in the Whitewater controversy has a much better standing to file a Judicial Complaint than a person who is involved and who has actually been prejudiced in the traditional sense by a politically partisan judge who appointed a "surefire enthusiastic' independent counsel to prosecute that person.

Thus Justice Scalia was correct in his factual prediction about 'politically partisan' judges choosing an independent counsel antagonistic to the administration but he was wrong in his legal observation that there is no formal complaint procedure by which such a judge could be blamed for such politically partisan acts. The issue now before this Court is what is the remedy when the judicial colleagues who are legally responsible for scrutinizing and resolving such a formal complaint brought against one of their breathren refuse to resolve or even mention the most critical issue raised in the complaint.

2. Mandamus

In Allied Chemical Corp. v. Daitlon Inc., 449 U.S. 33, 34-35, 101 S.Ct. 188, 66 L.Ed. 2d 193(1980), this Court held that

> "under the All Writs Act, 28 U.S.C., Sec. 1651 (a), courts ... may issue a writ of mandamus ... to confine an **inferior court** to a lawful exercise of its prescribed jurisdiction or to **compel it to exercise its authority when it is its duty to do so.**... In order to insure that the writ will issue only in extraordinary circumstances, this Court has required that a party seeking issuance have **no other adequate means** to attain the relief he desires." (emphasis added). (See also Bankers Life and Casualty Co. v. Holland, 346 U.S. 379, 382, 74 S.Ct. 145, 147, 98 L.Ed. 106 (1953)).

Rule 20.1 requires a petitioner for a writ of mandamus to establish that the issuance of the writ will be in aid of this Court's appellate jurisdiction, that there are exceptional circumstances warranting the writ, and that adequate relief cannot be obtained in any other form.

Considering Allied Chemical Corp, supra, and Rule 20.1, the three main conditions for the issuance of the writ of mandamus relevant to the present case are (1) a matter that originated before an inferior court over which this Court has jurisdiction, (2) an exceptional circumstance concerning a failure of a judge or judges on that lower court to exercise their authority, and (3) a lack of another remedy such as normal appeal. Concerning the first condition, the key issue is whether the Judicial Council is an inferior court to this Court. The All Writs Act, 28 U.S.C., Sec. 1651(App. 47a) allows this Court to issue a writ of mandamus only in aid of its "respective jurisdiction" over inferior courts. This Court has held that its

> "authority ... to issue a writ of...mandamus 'can be constitutionally exercised only insofar as such writs are in aid of its appellate jurisidiction. Marbury v. Madison, 1 Cranch, 137, 173-180, 2. L.Ed. 60(1803)'... If the challenged action of the Judicial Council was a judicial act or decision by a judicial tribunal, then perhaps it could be reviewed by this Court..." Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 86, 90 S.Ct. 1648, 1654, 26 L.Ed. 2d 100 (1970).

In Chandler, a District Court judge had "refused to disqualify himself" in two cases and was a party defendant in both civil and criminal litigations, and the Judicial Council subsequently ordered that he could only continue to sit on cases assigned to him prior to a certain date and could not sit on cases filed after that date. Id., 77, 80. The judge filed a petition for a writ of mandamus in this Court claiming that the Judicial Council did not have the legal authority to make such an order. The Judicial Council responded that it had not acted in a judicial capacity and therefore this Court had no jurisdiction under the All Writs Act to issue the writ of mandamus. Id., 82-83.

This Court did not decide the jurisdictional issue but denied the petition because "in present posture of the case other avenues of relief on the merits may yet be open to Judge Chandler." Id., 86. This Court noted that Judge Chandler had "twice expressed agreement with the disposition of judicial business effected by [the Judicial Council's] Order. Nothing in this record suggests that, were he to express disagreement, relief would not be forthcoming." Id., 88.

Although in Chandler, this Court did not rule on the jurisdictional issue, three Justices clearly found that this Court

had jurisdiction and even the Solicitor General in an amicus curiae brief, conceded that this Court has "jurisdiction to entertain the petition for writ of mandamus ... because [the Judicial Council] acted as a judicial ... tribunal for purposes of meeting the requirement that the case fall within this Court's appellate jurisdiction" Id., 83.

Justice Harlan in a 40 page concurring opinion stated that the

> "Court says, correctly I believe, that 'the threshold question in this case is whether we have jurisdiction to entertain the petition....' However, **that question is never decided**, and the Court's opinion closes with the statement that whether or not we have jurisdiction, 'plainly petitioner has not made a case for the extraordinary relief of mandamus...' The predicate for this conclusion appears to be that Judge Chandler has an adequate remedy available before the Council which he must involke before seeking relief here." Id., 89-90(emphasis added)

Justice Harlan discussed the legislative history of the predecessor to the present Judicial Conduct And Disability Act and stated that the history "leave(s) no doubt that the Councils' architects regarded the authority granted the Councils as closely bound up with the process of judging itself" and that the "legislative history shows Congress intended the Councils to act as judicial bodies..." Id., 103-104. Justice Harlan concluded that "the actions challenged by Judge Chandler sufficiently affect matters within this Court's appellate jurisdiction to bring his application for an extraordinary writ within our authority under Sec. 1651". Id., 117. However, Justice Harlan after holding that this Court had jurisdiction then stated that considering Judge Chandler's refusal to disqualify himself in two proceedings and his status as a party defendant in both civil and criminal litigation, there was "a prima facie basis for the Council's conclusion that some action was appropriate to alleviate what the Council members perceived as a threat to public confidence in the administration of justice" Id., 125. Justice Harlan therefore concurred in the "opinion that no such writ [of mandamus] should issue." Id., 129.

In a dissent by Justice Douglas in which Justice Black joined, Justice Douglas stated that the Council did act in the "role of a judicial entity" and therefore this Court had jurisdiction. Id., 134. Justice Douglas concluded that the

Council did not have the power to "censor or discipline any federal judge" and therefore the writ should be granted Id., 137.

Although technically speaking there is no prior controlling precedent stating that this Court has jurisiction in the present matter, there also is no precedent that states that this Court lacks jurisdiction. But there are strong opinions offered by three Justices stating that this Court does have such jurisdiction concerning rulings by a Judicial Council. This Court should adopt the reasoning of those three Justices. Also, the present statute concerning Judicial Councils, 28 U.S.C., Sec. 372 (App. 47a - 53a) provides for a typical judicial proceeding initiated by one party, defended by another party, and decided by judges, and that proceeding is far more judicial and adversarial in nature than the informal proceedings allowed by the statutes discussed in Chandler. Those statutes only stated that "(i)f the district judges in any district are unable to agree upon the adoption of rules or orders [regarding the division of business] the judicial council of the circuit shall make the necessary orders" and a "judicial council shall make all necessary orders for the effective and expditious administration of the business of the courts within its Circuit" Chandler, supra , 398 U.S. at 76, n. 1.

Concerning the second condition for granting a writ of mandamus,

> "(r)epeated decisions of this Court have established the rule that the writ will lie in a proper case to direct a subordinate Federal court to decide a pending cause (citation omitted) or to require a Federal court of inferior jurisidction to **reinstate a case, and to proceed to try and adjudicate the same."** Thermtron Products Inc. v. Hermandorfer, 423 U.S. 336, 352, 96 S.Ct. 584, 593, 46 L. Ed. 2d 542 (1976) (emphasis added).

A "failure to consider the merits of a...motion is a failure to exercise ... authority when [there is] the duty to do so.... (W)e believe that the **refusal to adjudicate a critical part** of a case" warrants the issuance of a writ of mandamus. In Re School Asbestos Litigation, 977 F. 2d 764, 793 (3rd Cir., 1992) (emphasis added). See also United States Dept. of Energy v. Crocker, 629 F.2d 1341, 1344-1345 (Temporary Emergency Court of Appeals, 1980) (mandamus is proper remedy to direct a lower court to review a matter).

In the present situation, 28 U.S.C., Sec. 372 (c) (3)(App. 47a) clearly and emphatically states that Judge Edwards had the duty of "reviewing [the] complaint" and issuing a "written order stating his reasons" for his decision. The local rule states that "**the chief judge will prepare a supporting memorandum that sets forth the allegations of the complaint and the reasons for the disposition.**" Rule 4 (f) (1) of the Rules Of The Judicial Council For The District Columbia Circuit (emphasis added). The purpose of the judicial complaint statute is "to assure the public that valid citizen complaints are being considered in a **forthright and just manner**." S. Rep. No. 362, 96th Cong., 1980 U.S. Code Cong. & Ad, News, 4321(emphasis added). Judge Edwards not only failed to give his reasons for his disposition of the most critical part of the complaint concerning recusal but failed to state that he even addressed that issue. The Judicial Council also never addressed the issue of recusal. Thus the second criteria for a writ of mandamus has been satisfied because no judge has performed the duty of addressing and resolving the recusal issue.

The third criteria that there is "no other adequate means to attain the relief" sought, Allied Chemical Corp. v. Daiflon Inc., supra, 449 U.S. at 35, has also been satisfied since the Judicial Conduct And Disability Act, 28 U.S.C., Sec. 372 (c) (10)(App. 51a) states that "all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise." It is this statutory prohibition against a normal appeal that actually helps the petitioner meet the third criteria for a mandamus set forth in Allied Chemical Corp., supra, which allows for such a writ of mandamus under the All Writs Act in such situations where there is no appeal.

If judges fail to perform their duty of conducting a review mandated by a statute, then there should be no reliance on another part of the statute which assumes that the judges had performed their duty and which then prohibits any further legal appeal concerning such completed duties. "In determining the meaning of [a] statute, we look not only to the particular statutory language but to the design of the statute as a whole, and to its object and policy." Crandon v. United States, 494 U.S. 152, 158, 110 S.Ct. 997, 1001, 108 L. Ed. 2d 132 (1990). A court "must construe a statute in such a manner as would give each provision of the statute full effect." Matter of Dyke , 943 F.2d 1435, 1442 (5th Cir., 1991). (emphasis added). "We should avoid an interpretation of a statute that renders any part of it superfluous and does not give effect to all of the words of

the statute." Beisler v. C.I.R., 814 F.2d 1304, 1307 (9th Cir., 1987). To give full effect to the object and policy of the Judicial Conduct And Disability Act, 28 U.S.C., Sec. 372(c)(3)(App. 47a) and its mandate that there be a "written order stating [the] reasons" for the dismissal of a judicial complaint, then this Court should not give effect to the other part of the statute which prohibits further review. Since the mandate concerning providing the reasons for dismissing the recusal portion of the complaint was never given effect then the prohibition against further review should not be given effect.

Thus the three main criteria for the issuance of a writ of mandamus have been met. Furthermore, case law has developed which incorporates those three criteria into a set of five guidelines. A Court of Appeals has held that there are

> "five guidelines for determining if a writ of mandamus should issue: (1) the party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires, (2) the petitioner will be damaged or prejudiced in a way not correctable on appeal, (3) the [lower] court's order is clearly erroneous as a matter of law, (4) the [lower] court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules, (5) the [lower] court's order raises new and important problems, or issues of law of first impression (citation omitted). **No single factor is determinative**(citation omitted) **and all five factors need not be satisfied** at once." Valenzuela Gonzalez v. United States District Court For The District Of Arizona, 915 F.2d 1276, 1278-1279 (9th Cir. 1990).

The guidelines are

> "cumulative and may not all point to the same conclusion (citation omitted). Moreover, all of the guidelines are unlikely to be met in any one case. Some are more relevant to particular categories of cases than others. Certain concepts relating to the traditional use of mandamus are not necessarily applicable in supervisory mandamus cases...In sum the guidelines serve only as a useful starting point, an analytic framework for determinations regarding the propriety of mandamus relief." In Re Cement Antitrust Litigation (MDL No. 296) 688 F.2d 1297, 1301 (9th Cir., 1982), affirmed, 459 U.S. 1191, 103 S.Ct. 1173, 75 L. Ed. 2d 425(1983)

The fifth guideline is the most pertinent guideline regarding the present case. This matter certainly involves a new and important problem and is a matter of first impression. Judge Tatel and Judge Kessler in their dissents never addressed the issue of recusal on the merits of the complaint but did however state that the general matter should be referred to the national Judicial Conference rather than decided by the local Judicial Council (App. 5a - 9a). Judge Kessler also stated that "the complaints raise significant issues affecting the public's perception of the impartiality and neutrality of the judiciary. The matter in which we now choose to resolve those issues will have long range implications for the future" (App. 8a -9a). Five past presidents of the American Bar Association took the very unusual step of issuing a public criticism of Judge Sentelle's conduct stating that they were "concerned over the possibility that, as reported in the press, **political considerations** may have influenced the decision of the Special Court to replace Robert Fiske with Kenneth Starr... (T)he people must be assured that their officials are subject to the rule of law - that they are under the law and not above it."(App. 41a - 42a).

The independent counsel act was conceived to prevent a situation where the people at the Justice Department were the only ones who could decide whether to prosecute their friends in the White House. The statute was designed to prevent conflicts of interest primarily involving a conflict among friends. We now know that a conflict of interest exists regardless of whether a President is investigated by his friends that he chose to appoint as Justice Department officials or is investigated by his foes that his partisan adversaries chose to appoint as an independent counsel. If the Watergate type of conflict involving a friendly conflict of interest was great enough to warrant the passage of the independent counsel act, then the present issue regarding an adversarial conflict of interest is great enough to warrant the granting of a writ of mandamus.

Regarding the fourth guideline of repeated errors, Senator Faircloth has recently publicly pushed for a criminal investigation of Commerce Secretary Ron Brown, and the Attorney General in response has triggered the first step toward the appointment of an independent counsel by commencing a preliminary investigation. (See New York Times articles of January 25, 28, February 17, 1995). If that preliminary investigation results in a request by the Attorney General for the appointment of an independent counsel, there is a pretty good chance that Judge Sentelle and his old friend Senator Faircloth

will not be sitting down over lunch this time to discuss who should be appointed the independent counsel to investigate Mr. Brown. But there is also a pretty good chance that based on Judge Edwards' ruling Judge Sentelle will be sitting on the panel which will have the opportunity to appoint a surefire enthusiastic independent counsel to investigate another of his old friend's political targets.

Not only is a writ of mandamus warranted which directs Judge Edwards and the Judicial Council to resolve an issue they refused to face, but the recusal issue is the type of issue that has required the issuance of the writ of mandamus more than other issues. There "are few situations more appropriate for mandamus than a judge's clearly wrongful refusal to disqualify himself" In Re International Business Machines Corp, 618 F.2d 923, 926 (2nd Cir., 1980).

The writ of mandamus is not only an appropriate remedy concerning recusal but it has been held to be the only remedy. The writ of mandamus is an

> "appropriate remedy against a judge who refuses to recuse himself when required to do so under [the recusal statute, 28 U.S.C., Sec. 455a]. The writ of mandamus is the vehicle by which we may exercise our **supervisory powers** over the [lower] courts with respect to Sec. 455(a). To require a timely petition for a writ of mandamus as the sole remedy serves another important purpose: that of **preventing injury to the public perception of the judicial system before it has a chance to occur**. If a party is deprived of his substantial rights in a trial before an actually biased judge, the harm can be remedied (though not costlessly) by a new trial before an unbiased jjudge. But the harm to the public's perception of the judicial system when a judge who appears to be biased proceeds in a case is more difficult to correct. **Prevention in such circumstances is clearly preferable to attemtps to cure**. Accordingly we hold that when a judge denies a motion to disqualify himself under Sec. 455(a), the moving party's **sole recourse** is to apply to this court immediately for a writ of mandamus." United States v. Balistrieri, 779 F.2d 1191, 1205 (7th Cir., 1985), cert. den., DiSalvo v. United States, 475 U.S. 1095, 106 S. Ct. 1490, 89 L. Ed. 2d 892(1986) (emphasis added).

"A judge's refusal to recuse himself in the face of a substantial challenge casts a **shadow not only over the individual litigation but over the integrity of the federal judicial process as a whole**. The shadow should be dispelled at the earliest possible opportunity by an authoritative judgment either upholding or rejecting the challenge. In recognition of this point we have been **liberal** in allowing the use of the extraordinary writ of mandamus to review orders denying motions to disqualify....[W]here a serious question is raised, we shall interpret **generously** our power to issue the writ in order that we may lay the question to rest at the earliest possible time" Union Carbide Corp. v. U.S. Cutting Services, Inc.,782 F.2d 710, 712, 713 (7th Cir., 1986) (emphasis added).

"Historically, mandamus has been considered a proper remedy for interlocutory review in cases where the [lower] court clearly abused its discretion or usurped and misapplied federal, judicial power. See e.g. Bankers Life and Casualty Co. v. Holland, [supra, 346 U.S. 379]. In recent years, however federal courts, with the Supreme Court's approval, have come to appreciate the usefulness and flexibility of mandamus in other, less extreme, situations. In particular **mandamus has emerged as an appropriate remedy in the supervision of [lower] courts by the various courts of appeal**. La Buy v. Howes Leather Co., 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed. 2d 290 (1957). This circuit has indicated its acceptance of the more modern ground for the issuance of mandamus - the exercise of appellate **supervisory power...We are not concerned here only with the rights of private litigants...** Rather our interest is with effective administration and **supervision** of the courts of our circuit....We believe that the issue [of recusal raised below] presents a proper case for issuance of the writ. If ... the trial judge is wrong, the remedy of **supervisory mandamus** will not only prevent enormous waste of judicial time and energy, but will guide the district judges in their treatment of a problem unlikely ever to present itself for traditional appellate review." In Re Virginia Electric and Power Company, 539 F.2d 357, 365 (4th Cir. 1976) (emphasis added).

Thus when it comes to recusal, the writ of mandamus should be liberally granted and the courts should focus not on any prejudice to any individual party but the prejudice to the

image of the judicial system caused by a judge's failure to recuse himself or herself in the appropriate circumstance. Thus the present petitioner who has not suffered any individual prejudice in this matter does have just as much standing as any party to seek a writ of mandamus since the writ would immediately lessen the damage to the image of the judiciary caused by Judge Sentelle's failure to recuse himself in a situation which so clearly warranted his recusal.

In the present case, the recusal of Judge Sentelle was clearly mandated. Five past presidents of the American Bar Association have publicly stated that possible "political considerations" may have tainted the decision to replace Fiske with Starr and that there are "doubts about the fairness and objectivity of the selection process in this case". (App. 41a - 42a). The Court of Appeals for the District of Columbia Circuit has held that the legislative history of the Judicial Conduct and Disability Act demonstrates that the Act "was intended to include wilfull misconduct in office, willful and persistent failure to perform duties of the office, habitual intemperance, and other **conduct prejudicial to the administration of justice that brings the judicial office into disrepute".** Hastings Judicial Conference of U.S., supra 829 F.2d at 106. The legislative history states that the statute "should be informed by the Code of Judicial Conduct on the American Bar Association, as approved by the Judicial Conference; resolutions of the Conference relating to judicial conduct; and congressional enactments concerning judicial conduct". Id. The A.B.A. Code of Judicial Conduct and a federal statute both require recusal when a judge's "impartiality might reasonably be questioned." The A.B.A. Code of Judicial Conduct states that a "judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned ..." Canon 3C. (App. 55a). Congress has enacted a statute which states that "(a)ny justice, judge, or magistrate of the United States shall disqualify himself in any proceedings in which his partiality might reasonably be questioned". 28 U.S.C., Sec. 455(a) (App. 54a).

It will no doubt be argued that the rules on recusal were not intended to make judges cut off their social contacts with their old political friends. However,

> "the judicial code insists that a full-time judge arrange his or her affairs to remove most economic and political entanglements that might impair the judge's objectivity. The rearranging that can be required may be substantial and may require such wrenching steps that a judicial

> candidate may decide that the sacrifices are too great to warrant accepting a judgeship ... Although persons who become judges have often followed an intensely political route to the office, once on the bench, the new judge must eschew most political connections beyond voting." Modern Legal Ethics, by Charles W. Wolfram, West Publishing Co., 1986, pp. 981, 986.

Not only must a judge eschew his or her political connections, but it is even more important that a judge recuse himself or herself from cases involving such political connections. This Court has held that the purpose of the recusal statute , 28. U.S.C., Sec. 455(a)(App. 54a)

> "is to avoid even the appearance of partiality. If it would appear to a **reasonable person** that a judge has ... an interest in the litigation then an appearance of partiality is created even though no actual partiality exists .... because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible .... We must continuously bear in mind that to perform its high function in the best way justice must satisfy the appearance of justice ... The very purpose of Sec. 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible". Liljeberg v. Health Services Acquisition Corp. supra, 486 U.S. at 860, 864, 865(emphasis added).

In Liljeberg, this Court held that the judge should have vacated a prior judgment because he sat as a trustee of a university which was not a party to the action but which had an "interest in the ... litigation". Id, 861, 850-851. This Court held that the judgment should be vacated because although the trial judge "did not have actual knowledge of (the university's) interest in the dispute" when the case was tried and decided, Id, 864, he should have granted a post trial motion to vacate the judgment filed by the losing party when it learned of the judge's interest. The Court also held that the judge "should have recused himself (earlier) when he obtained actual knowledge of that interest" soon after he entered formal judgment but long before the losing party first learned of the judge's interest. Id, 858, 850, 855, 866-869.

Furthermore, the legal distinction between Article II and Article III, which might allow a judge to have ex parte communications when he acts under Article II rather than

Article III, is irrelevant regarding recusal. Canon 3C of the Code of Judicial Conduct applies the rule of disqualification to judges regardless of whether they are acting in an adjudicative or administrative capacity. Canon 3 is divided into 3 parts, with the first part covering "A. Adjudicative Responsibilities", the second part covering "B. Administrative Responsibilities", and the third part covering "C. Disqualification" and containing the above rule requiring judges to disqualify themselves when their impartiality might reasonably be questioned. Thus the disqualification section obviously applies to the previous two sections and covers what Judge Edwards described as the "administrative" act which occurs when a member of the Special Division appoints an Independent Counsel (App. 20a).

Regarding the federal statute on disqualification, 28 U.S.C. Sec. 455 (a)(App. 54a), that statute similarly states that all judges should "disqualify (themselves) in any proceeding in which (their) impartiality might reasonably be questioned." By way of example, the statute, Sec. (d) (1), states that the phrase "proceeding includes pretrial, trial, appellate review or other stages of litigation." It is important to note that "the term including' is not one of all encumbracing definition, but connotes simply an illustrative application of the general principle." Federal Land Bank of St. Paul v. Bismark Lumber Co., 314 U.S. 95, 100, 62 S.Ct. 1, 86 L. Ed. 65 (1941). "It has been said that the word 'includes' is usually a term of enlargement, and not of limitation. It, therefore, conveys the conclusion that there are other items includable, though not specifically enumerated." Federal Election Commission v. Mass. Citizens for Life, 769 F2d 13, 17 (lst Cir., 1985), affirmed, 479 U.S. 238, 107 S.Ct. 616, 93 L. Ed. 2d 539(1986)..

Thus the disqualification statute requires judges to disqualify themselves in all proceedings in which their impartiality might be reasonably questioned and there is no exception to the rule which allows judges to ignore that rule when they are acting in an administrative rather than adjudicative capacity. Therefore, if Judge Edwards had addressed the disqualification issue, he would not have been able to wring an exception out of it which allows judges to make an administrative decision to appoint an independent counsel in a situation where they have a conflict of interest.

Rather than attempt to resolve the recusal issue, Judge Edwards merely stated in the context of addressing the ex parte issue that

> "(e)ven had the subject judge in this case discussed the pending application [for an independent counsel] with his congressional friends...he would have at most engaged in the same consultative process relied on by former members of the Special Division in connection with prior appointments" (App. 26a)

However, Judge Edwards never addressed the issue of whether a judge on the Special Division should recuse himself when his friends have almost as much interest in the matter as the President. Imagine if Judge Sentelle was an old friend of President Clinton from Arkansas rather than an old friend of Senator Faircloth from North Carrolina, and imagine if Judge Sentelle lunched with his old friend not in the Senate dining room but at the White House and they consulted over who should be the independent counsel. The issue is not so much what they said that day at lunch but the friendship that had grown over the years which would necessarily taint any decision made after lunch involving such an old friend.

3. CONCLUSION

Therefore, this Court should issue a writ of mandamus directing the Judicial Council to grant the Petition For Review and to fully address and resolve the recusal issue. This Court could also recommend to the Judicial Council that it refer the matter to the national Judicial Conference pursuant to 28 U.S.C., Sec. 372 (c) (7) (B)(ii)(App. 50a). As noted in the legislative history of the Judicial Conduct And Disability Act, a "national court of stature will help alleviate the fear and **public perception** of a local whitewash". S. Rep. No. 362, 96th Cong., 1980 U.S. Code Cong. & Ad. News, 4317(emphasis added)..

Francis T. Mandanici
Petitioner Pro Se and
Counsel Of Record

K. APPENDIX TABLE OF CONTENTS

MATTERS CONCERNING JUDICIAL COUNCIL

1. Notice from Judicial Council, dated December 30 1994 2a

2. Order of Judicial Council, dated December 30, 1994 3a

3. Concurring Statement of Henderson, Circuit Judge 4a

4. Concurring Statement of Green, District Judge 5a

5. Separate Statement of Tatel, Circuit Judge 5a

6. Separate Statement of Kessler, District Judge 8a

MATTERS CONCERNING DECISION OF CHIEF JUDGE OF CIRCUIT, HARRY T. EDWARDS

7. Order of Chief Judge, dated November 1, 1994 11a

8. Memorandum of Chief Judge, dated November 1, 1994 12a

MISCELLANEOUS

9. Judicial Complaint, dated September 1, 1994 28a

10. Supplement to Complaint, dated October 17, 1994 38a

11. Petition for Review, dated November 29, 1994 43a

12. All Writs Act, 28 U.S.C., Sec. 1651 47a

13. Judicial Conduct and Disability Act, 28 U.S.C., Sec. 372. 47a

14. Recusal Statute, 28 U.S.C., Sec. 455 54a

15. Canon 3 of American Bar Association's Code of Judicial Conduct 54a

1) **NOTICE FROM JUDICIAL COUNCIL, dated December 30, 1994**

JUDICIAL COUNCIL OF THE DISTRICT OF COLUMBIA CIRCUIT

In the Matter of	)	
	)	
A CHARGE OF	)	Judicial Council
JUDICIAL MISCONDUCT	)	Complaint
OR DISABILITY	)	No. 94-8

NOTICE

To: Mr. Francis T. Mandanici
180 Pearsall Place
Bridgeport, CT 06605

You are hereby notified that by order entered December 30, 1994, (copy enclosed) the Judicial Council of the District of Columbia Circuit has denied complainant's petition for review. This order is final and is not reviewable.

/s/ Ron Garvin
Ron Garvin, Clerk
U.S. Court of Appeals for
the D.C. Circuit

Date: December 30, 1994

2) **ORDER OF JUDICIAL COUNCIL, dated December 30, 1994**

BEFORE THE JUDICIAL COUNCIL OF THE DISTRICT OF COLUMBIA CIRCUIT

In the Matter of **Judicial Council Complaint Nos. 94-8 & 94-9**

A CHARGE OF JUDICIAL MISCONDUCT OR DISABILITY

Before Silberman, Acting Chief Judge of the Circuit, Williams, Henderson, Rogers, and Tatel, Circuit Judges; Penn, Chief Judge of the U.S. District Court, Green, Jackson, Sporkin, Lamberth, and Kessler, District Judges.

ORDER

Upon consideration of the petitions for review of the decision in In Re Charge of Judicial Misconduct or Disability, Complaint Nos. 94-8, 94-9, 94-10 (Judicial Council, D.C. Cir. Nov. 1, 1994), it is

ORDERED that Chief Judge Edwards' Order of Dismissal be, and hereby is, affirmed.

/s/ Laurence H. Silberman
Laurence H. Silberman, Acting Chief
District of Columbia Circuit

Concurring statement filed by Circuit Judge Henderson
Concurring statement filed by District Judge Green
Separate statement filed by Circuit Judge Tatel
Separate statement filed by District Judge Kessler

Date: December 30, 1994

3) CONCURRING STATEMENT OF HENDERSON, CIRCUIT JUDGE

Karen LeCraft Henderson, Circuit Judge: I fully agree with the order of dismissal issued by Chief Judge Edwards in this matter. The order speaks for itself and does so persuasively; there is therefore no need to interpret it. Nevertheless, assuming the Code of Judicial Conduct does apply to the behavior complained of, I believe nothing improper occurred, or appeared to.

The setting was the U.S. Senate dining room where three friends, all from the same state and all public officials, had lunch together as they had done in the past. One was a federal judge who was also a member of a panel then considering the appointment of an independent counsel. The other two were United States Senators, one of whom had publicly criticized one of the proposed candidates for the independent counsel appointment and neither of whom was a litigant or represented a litigant, in any proceeding pending before the judge. Stripped of speculation, hypothesis and just plain flights of fancy, that is the sum and substance of the challenged conduct. Whether or not conduct gives rise to an appearance of impropriety may necessarily be a subjective call, but to assert that this conduct does so is plainly unreasonable.

Even if the three had discussed the appointment of an independent counsel, including the Attorney General's suggested candidate, I believe no impropriety would have occured, or would have appeared to. The members of the Special Division sit to appoint an independent counsel. 28 U.S.C. §§591 et seq. The Attorney General, as she is apparently authorized to do, suggested a nominee. See S. Rep. No. 170, 95th Cong., 1st Sess. 56 (1977), reprinted in 1978 U.S.C.C.A.N. 4216, 4272. Her nominee was the individual she originally appointed as a "special attorney" under 28 U.S.C. § 543 (a). That statute authorizes the Attorney General to appoint special attorneys "to assist United States attorneys when the public interest so requires" and has no connection to the Special Division's appointment of an independent counsel. See also Pub. L. No. 103-270, § 7 (h), 108 Stat. at 738. The decision before the Special Division in July 1994 was not whether to "remove" the Attorney General's proposed nominee as independent counsel but instead to select an independent counsel in the first instance. I believe we are all agreed that the Special Division, in discharging that duty, must both identify candidates itself and gather information about suggested

candidates, including any suggested by the Attorney General or other public officials. It is hard to picture how an appointment could be otherwise made.

4) CONCURRING STATEMENT OF GREEN , DISTRICT JUDGE

Joyce Hens Green, District Judge, concurring: I concur in the result that the complaints be dismissed but am compelled to note that the action at issue did, however inadvertently, create an unfortunate appearance.

5) SEPARATE STATEMENT OF TATEL, CIRCUIT JUDGE

Tatel, Circuit Judge, separate statement. I write separately because I do not agree that the Judicial Council should review the Chief Judge's order on its merits. As the Chief Judge noted in his opinion, the Special Division is a "national court" whose administrative functions have "little or no relation" to this circuit. Opinion of the Chief Judge, slip op. at 6 (Judicial Council, D.C. Cir. Nov. 1, 1994). To me it seems inappropriate that the Special Division, set up as an independent entity by Congress, with its members appointed by the Chief Justice from three different circuits, would be subject to discipline by this circuit's Judicial Council. So too it seems inappropriate that any one member of the Special Division would be subject to this circuit's Judicial Council, for if all three members of the Division were involved in a challenged activity, allowing each circuit's judicial council to consider the complaint against the member from that circuit might lead to inconsistent results.

For these reasons, this matter "in the interest of justice, is not amenable to resolution by the judicial council" of this circuit. 28 U.S.C. § 372(c)(7)(B)(ii) (1988 Supp. V 1993). Rather than dismissing the complaints under § 372(c)(3)(A)(i), as the Chief Judge did, I would have preferred the appointment of a special committee, pursuant to § 372(c)(4), which in turn could have recommended that the Council certify the complaints to the Judicial Conference under § 372(c)(7)(B). The Special Division is a national court. Complaints against its members should be considered by a national body.

I am also concerned that the Judicial Council's affirmance on the merits suggests that the appearance of

impropriety standard of the Code of Judicial Conduct does not always apply to the members of the Special Division. I believe that it does. Because that standard is fundamental to the independence and impartiality of the federal judiciary, it must apply to all official activities of Article III judges, including those undertaken at the direction of Congress pursuant to Article II.

The appearance of impropriety standard is set forth in Canon 2 of the current Code of Conduct for United States Judges. Its purpose is to maintain public confidence in the courts as impartial forums for the resolution of disputes. By its terms, Canon 2 is not limited to our purely judicial functions: "A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities." Canon 5 advises us to "regulate extra-judicial activities to minimize the risk of conflict with judicial duties," and Canon 5G cautions that "[a] judge should not, in any event, accept . . . an [extrajudicial] appointment if the judge's governmental duties would . . . tend to undermine the public confidence in the integrity, impartiality, or independence of the judiciary." The commentary to Canon 5G deals directly with extra-judicial assignments like the Special Division, recognizing that "[t]he dangers attendant upon acceptance of extra-judicial governmental assignments are ordinarily less serious where the appointment of a judge is required by legislation," as such assignments "typically do not pose a serious threat to the independence of the judiciary." But that commentary warns that "where Congress requires the appointment of a judge to perform extra-judicial duties, the judge may accept the appointment provided that the judge's services would not interfere with the performance of the judge's judicial responsibilities or tend to undermine public confidence in the judiciary."

Canons 2 and 5, then, apply the Code to our extra judicial activities, including those assigned by Congress, and make it clear that any action undertaken while participating in such activities that would tend to undermine the public's confidence in the independence and impartiality of the judiciary violates the Code. In certain circumstances, such violations will indeed threaten the "effective and expeditious administration of the business of the courts," and complaints alleging such violations are a proper subject for review under the Judicial Council Act. 28 U.S.C. § 372(c)(1). I do not understand the Chief Judge's opinion or this Council's affirmance to mean otherwise. Yet the Council now affirms the dismissal of complaints charging an appearance of impropriety in

connection with a meeting by a member of the Special Division because "even accepting the complaints as true for purposes of this analysis," they do not allege a violation of any "provision of law or ethical Canon." Opinion of the Chief Judge, slip op. at 16. While expressing no view on the merits of those complaints --- as I stated above, the Judicial Conference is the appropriate body to consider these allegations -- I do not agree that the circumstances alleged could never constitute a violation of ethical or legal standards. I thus would not have dismissed the complaints "for failure to conform to 28 U.S.C. § 372(c)(1)." Id.

My conclusion does not change merely because the complaints allege impropriety stemming from a meeting which, as the Chief Judge points out, is authorized by law. The Code provision barring ex parte contacts specifically excepts contacts that are "authorized by law." Canon 3A(4). The Ethics Act plainly contemplates that the members of the Special Division will engage in consultations -- indeed, as Chief Judge Edwards points out, it is hard to imagine how the Division would function without such contacts -- so the fact of such consultations in and of itself does not violate Canon 3A. But Canons 2 and 5 never permit appearances of impropriety, even those associated with activities "authorized by law." Thus, any communication by an Article III judge in connection with Article II activities could, under certain circumstances, amount to an appearance of impropriety and thus a violation of Canon 2 and § 372. The fact that not every provision of the Code may apply to Article II functions or that some difficult distinctions may be necessary for Article II activities does not mean that the appearance of impropriety standard is inapplicable.

Nothing in the language of the Ethics Act suggests that Congress intended to exempt members of the Special Division from the ethical canons prohibiting the appearance of impropriety which may arise from the circumstances surrounding certain ex parte consultations. When Congress chose to place this Article II power in the hands of Article III judges it knew that we would be bound by the Judicial Code in all of our official activities. I would thus not assume from its silence that Congress intended to interfere with ethical standards designed to safeguard the integrity of Article III courts.

Indeed, if congress had intended to ease the ethical restrictions on federal judqes serving on the Special Division, it would raise fresh questions regarding the constitutionality of the Independent Counsel provisions of the Ethics in Government

Act. In sustaining the constitutionality of the Act, the Supreme Court held only that the Article II appointment power is not "per se" inconsistent with Article III, emphasizing that it did "not mean to say that Congress' power to provide for interbranch appointments of 'inferior officers' is unlimited." See Morrison v. Olson, 487 U.S. 654, 679 n.16, 675 (1988). The Court acknowledged that if the "provisions for appointment had the potential to impair the constitutional functions assigned to one of the branches," or if the grant of the appointment power created "any taint of the independence of the Judiciary," the Act might be "invalid under Article III." Id. at 675-76, 684 .

In the end, the Court sustained the Act because it did not "pose any threat to the impartial and independent federal adjudication of claims within the judicial power. " Id. at 683 (internal quotation marks and citation omitted). To hold that Congress expected Article III judges to carry out certain Article II communications free from the constraints of the appearance of impropriety standard of Canon 2 would, I believe, pose just such a threat.

6) SEPARATE STATEMENT OF KESSLER, DISTRICT JUDGE

Kessler, District Judge

I, like Judge Tatel, conclude that I cannot vote to affirm dismissal of the complaints for failure to allege conduct that is"prejudicial to the effective and expeditious administration of the business of the courts".(footnote 1) I agree with his conclusion that, because the Special Division is a "national court", complaints against its members or about its functioning should be certified to the Judicial Conference, pursuant to 28 U.S.C. S 372 (c) (7) (B), and therefore that this matter "is not amenable to resolution by the judicial council" of this circuit, under 28 U.S.C. § 372 (c)(7) (B) (ii).

In particular, I agree with Judge Tatel's statement of the proposition that Article III judges are always subject to the appearance of impropriety standard whether they are exercising Article II or Article III powers.

I write separately to make the following points.

First, the complaints raise significant issues affecting the public's perception of the impartiality and neutrality of the

judiciary. The manner in which we now choose to resolve those issues will have long range implications for the future. The precedent set by this Circuit affects not only our sister circuits throughout the country but may well influence Congressional thinking on these issues when lawmakers consider future proposals to assign non-Article III duties to members of the federal judiciary.

Second, the public's confidence in the integrity of the judiciary rests in large part on a widespread understanding and acceptance of the strict (sometimes frustrating and inhibiting) rules of conduct under which we operate. It is that confidence in our integrity which provides the moral legitimacy upon which the power of an appointed judiciary rests. Those rules of conduct, which demand that even the appearance of impropriety in all activities be avoided, are both our strength and our protection. We act at our peril when we allow them to be watered down. To the extent that we dilute those rules, and lower the standards to which we are held accountable, we undermine the public's confidence in our integrity and impartiality.

The fact that the Supreme Court has upheld the constitutionality of the Ethics in Government Act, providing for the authority of the Special Division to appoint independent counsel,(footnote 2) merely establishes what is constitutionally permissible. What is essential for Congress and the electorate to fully appreciate is that to the extent the judiciary is asked to carry out non-Article III tasks, i.e., those other than its traditional adjudicatory functions, we will be required to engage in activities which are fundamentally incompatible with the neutrality demanded of us by the public and by the nature of our Article III duties. In short, we cannot stand impartially above the fray as we adjudicate and squarely in the midst of the fray as we carry out non-adjudicatory Article II functions.

Finally, I fully agree with Judge Tatel that "difficult distinctions" may well have to be drawn in applying the appearance of impropriety standard to Article II activities.(footnote 3) Drawing such "difficult distinctions" on a principled basis is what we as judges do every day. While I do not underestimate the difficulty or sensitivity of that line-drawing activity, I also do not question our ability to continue to engage in the reasoned decision-making which is the traditional function of Article III judges.

For the foregoing reasons I concur in Judge Tatel's separate statement.

Footnotes

1. See 28 U.S.C., Sec. 372 (C)(1)(Supp. V 1993), Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, hereafter referred to as "the Judicial Councils Act".

2. Morrison v. Olson, 487 U.S. 654, 677-679(1988)

3. For example, Chief Judge Edwards is correct that, as a general proposition, the Ethics in Government Act of 1978 (28 U.S.C. Secs. 591 - 599 (1988), as amended by 28 U.S.C.A.Secs. 591-599 (West Supp. Pamph. No. 3, Sept. 1994)) envisions that the Special Division will consult with others in order to carry out its appointment functions and therefore that the Code's provision barring ex parte contacts does not apply to those functions. However, it might still be necessary to determine whether there are circumstances in which the making of such ex parte contacts, albeit for the purpose of carrying out these appointing duties, might constitute an appearance of impropriety.

7) The Judicial Council

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the District of Columbia Circuit

FILED NOV 0 1 1994

RON GARVIN
CLERK

Filed November 1, 1994

IN THE MATTER OF A CHARGE OF JUDICIAL MISCONDUCT OR DISABILITY

Judicial Council Complaint
Nos. 94–8, 94–9, and 94–10

BEFORE: EDWARDS, *Chief Judge* of the Circuit.

ORDER

Upon consideration of the complaints herein, filed against a judge of the United States Court of Appeals for the District of Columbia Circuit pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 and the Rules of the Judicial Council for the District of Columbia Circuit Governing Complaints of Judicial Misconduct or Disability, it is

ORDERED, for the reasons stated in the attached Opinion, that the complaints be dismissed as not in conformity with 28 U.S.C. § 372(c)(1) (Supp. V 1993). Complainants have failed to allege that the subject judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.

The Clerk is directed to send copies of this Order and accompanying Opinion to complainants and to the subject judge. *See* 28 U.S.C. § 372(c)(3) (1988).

Harry T. Edwards

HARRY T. EDWARDS, *Chief Judge*
District of Columbia Circuit

The Judicial Council

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed November 1, 1994

IN THE MATTER OF A CHARGE OF
JUDICIAL MISCONDUCT OR DISABILITY

Judicial Council Complaint
Nos. 94–8, 94–9, and 94–10

BEFORE: EDWARDS, *Chief Judge* of the Circuit.

EDWARDS, *Chief Judge:* This matter involves three complaints of judicial misconduct, arising pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 ("the Judicial Councils Act"). A principal premise of the Judicial Councils Act is that federal circuit, district, bankruptcy, and magistrate judges will not

> engage[ ] in conduct prejudicial to the effective and expeditious administration of the business of the courts.

28 U.S.C. § 372(c)(1) (Supp. V 1993). "Any person" who has reason to believe that a judge has engaged in such conduct, may file a written complaint, along with a brief statement of the facts constituting such conduct, with the clerk of the court of appeals. *Id.* The matter is then referred to the Chief Judge of the Circuit, who, by written order, may dismiss the complaint if it is (i) not in conformity with section 372(c)(1), (ii) directly related to the merits of a decision or procedural ruling, or (iii) frivolous. *See* 28 U.S.C. § 372(c)(3)(A) (1988); D.C. CIR. JUD. MISCONDUCT R. 4(c)(1).

The instant complaints involve charges against a circuit judge, who also serves as a member of the Court of Appeals "Division to Appoint Independent Counsels" ("the Special Division"). *See* 28 U.S.C. § 49 (1988). The complainants allege that the accused judge engaged in misconduct when he had *ex parte* communications with two United States Senators at a time when the Special Division was considering the

appointment of an independent counsel to investigate the so-called "Whitewater" affair. Implicit in the complaints is the suggestion that the Senators may have improperly influenced the judge in his selection of an independent counsel. The complainants also charge that the judge improperly failed to disclose correspondence from other members of Congress regarding this matter. Finally, the complainants assert that, without regard to whether the judge was actually influenced, the judge's conduct resulted in an appearance of impropriety that was "prejudicial to the effective and expeditious administration of the business of the courts." These complaints are misguided in their assumptions about the applicable legal and ethical principles at issue.

When acting to appoint an independent counsel, a member of the Special Division draws authority not from Article III of the United States Constitution (which defines the "judicial Power of the United States"), but from the Appointments Clause of Article II, Section 2:

> Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2. *See* note 5 *infra*. Common sense dictates and history confirms that prudent exercise of the appointment power under Article II necessitates consultation by those making appointments. Because I am aware of no constitutional or ethical precept that prohibits the President, judges, or heads of departments from consulting with other persons when acting under Article II, and because there is nothing in any statute governing the *appointment* work of the Special Division that so limits its members, the challenged conduct of the accused judge is not "conduct prejudicial to the effective and expeditious administration of the business of the courts." Accordingly, for the reasons articulated below, I dismiss the complaints as not in conformity with 28 U.S.C. § 372(c)(1).

I. BACKGROUND

The subject of these complaints [1] is a judge of the United States Court of Appeals for the District of Columbia Circuit. In addition to his regular assignment on the D.C. Circuit, the judge also serves as a member of the Special Division.

There are three members of the Special Division, each of whom is appointed by the Chief Justice of the United States for a two-year term.[2] To establish a base of operation, Congress designated the Special Division a "division of the United States Court of Appeals for the District of Columbia [Circuit]," *see* 28 U.S.C. § 49; but the Special Division is in no way involved with the judicial work of the D.C. Circuit. One appointee to the Special Division comes from the D.C. Circuit, and no more than one appointee can come from any particular court. The authority to *appoint* independent counsels is the principal responsibility of the Special Division.

The appointment authority of the Special Division is defined in detail in the Ethics in Government Act of 1978, as amended by the Independent Counsel Reauthorization Acts of 1987 and 1994 (collectively "the Ethics Act"). *See generally* 28 U.S.C. §§ 591–599 (1988), *as amended by* Independent Counsel Reauthorization Act of 1994, 28 U.S.C.A. §§ 591–599 (West Supp. Pamph. No. 3, Sept. 1994). Under the Ethics Act, the Special Division acts, upon receipt of an application from the Attorney General, to designate an independent counsel charged with the investigation and possible prosecution of criminal violations by certain federal government officials. *See* 28 U.S.C. § 593. The independent counsel provisions of the Ethics Act expired in December 1992, *see* 28 U.S.C. § 599 (1988), but were subsequently reenacted, with amendments not relevant here, by the Independent Counsel

---

[1] This Circuit's Rules governing the processing of complaints of judicial misconduct prohibit disclosure of the subject judge's identity under these circumstances. *See* D.C. CIR. JUD. MISCONDUCT R. 4(f)(1).

[2] The Chief Justice recently reappointed the subject judge to serve a second two-year term as a member of the Special Division.

Reauthorization Act of 1994, Pub. L. No. 103–270, 108 Stat. 732 (1994).

In January 1994, during the period between the most recent expiration and reauthorization of the independent counsel statute, the Attorney General exercised her authority under 28 U.S.C. § 543 (1988) (appointment of special attorneys) to appoint Robert B. Fiske, Jr., as an independent counsel to investigate the Whitewater matter. *See* Independent Counsel: In re Madison Guaranty Savings & Loan Association, 59 Fed. Reg. 5,321 (1994) (to be codified at 28 C.F.R. §§ 600.1, 603.1) (establishing office of independent counsel). After the enactment of the 1994 Reauthorization Act, the Attorney General applied to the Special Division for the appointment of an independent counsel under the Act, and requested that Mr. Fiske receive this appointment. The Special Division rejected the advice of the Attorney General, and, on August 5, 1994, appointed Kenneth W. Starr, formerly a judge of the United States Court of Appeals for the District of Columbia Circuit and Solicitor General of the United States, to be the Whitewater independent counsel.

Shortly after the publication of the decision appointing Mr. Starr, the press reported that the subject judge had met for lunch with North Carolina Republican Senators Jesse Helms and Lauch Faircloth while the Attorney General's application was pending before the Special Division. *See, e.g.*, Howard Schneider, *Judge Met Sen. Faircloth before Fiske was Ousted*, WASH. POST, Aug. 12, 1994, at A1. The news reports described Senator Faircloth as a critic of Mr. Fiske's investigation, and also referred to correspondence critical of Mr. Fiske that had been received by the Special Division from other members of Congress, correspondence which was not placed in the Division's public files until after news organizations appealed for its release. *See id.*

Following publication of these news reports, three complaints citing the subject judge's conduct were filed with the Clerk of the Court of Appeals, and thereafter referred to the Chief Judge of the Circuit. Complainant in No. 94–8, filed September 2, 1994, argues that the subject judge's meeting

with Senators Helms and Faircloth, and his receipt of and failure immediately to disclose the congressional correspondence, constituted *ex parte* communications in violation of Canon 3(A)(4) of the CODE OF CONDUCT FOR UNITED STATES JUDGES. Complainant also asserts that the subject judge is required to recuse himself from participation in the Whitewater "proceeding," citing Canon 3(C)(1) and 28 U.S.C. § 455(a) (1988) (judge should disqualify himself from proceeding in which his impartiality might reasonably be questioned). Complainant seeks the subject judge's "voluntary retirement" from the Special Division, an order from the Judicial Council that no further cases be assigned to the judge for a period of time, and a public censure or reprimand.

Complainant in No. 94–9, filed on September 16, 1994, questions the subject judge's "judgment" in appointing Mr. Starr, notes the "appearance of impropriety" arising from the lunch with the Senators, and questions whether the judge should have considered the correspondence from the members of Congress. Complainant seeks no specific relief, asking instead that the appointment of Mr. Starr be "studied" and the conduct of the subject judge "reviewed."

Finally, complainant in No. 94–10, also filed on September 16, 1994, cites an "appearance of impropriety" arising from the meeting with Senators Helms and Faircloth, and contends that the subject judge has "failed to uphold the integrity and independence of the judiciary." Complainant requests a public reprimand of the subject judge.

II. THE JURISDICTION OF THE JUDICIAL COUNCIL FOR THE D.C. CIRCUIT TO CONSIDER THIS MATTER

Before turning to the substance of complainants' allegations, there is a threshold jurisdictional question to be resolved, *i.e.*, whether a member of the Special Division is subject to disciplinary proceedings in this circuit. In other words, because the Special Division does not operate as a part of the D.C. Circuit in conjunction with any business of the

circuit's courts, it is unclear that the Judicial Council for the District of Columbia Circuit has jurisdiction over members of the Special Division with respect to matters unrelated to the courts of the D.C. Circuit.

Control of the disciplinary procedures established by the Judicial Councils Act is one of the "general administrative functions" of the Circuit Judicial Council. *See* H.R. REP. No. 1313, 96th Cong., 2d Sess. 9 (1980). The Council, in turn, is empowered to "make all necessary and appropriate orders for the effective and expeditious administration of justice *within its circuit.*" 28 U.S.C. § 332(d)(1) (1988) (emphasis added). It is questionable whether this administrative authority extends to the Special Division. While nominally a division of the Court of Appeals for the District of Columbia Circuit, *see* 28 U.S.C. § 49, the Special Division has no functional relationship to the Court of Appeals. The Division keeps its own records and establishes its own procedures.[3] Further, because the Division must include two judges who are not members of the Court of Appeals for the D.C. Circuit, *see* 28 U.S.C. § 49(d), it cannot constitute a panel of the Court authorized to decide "cases or controversies" within the jurisdiction of the D.C. Circuit, and subject to the Court's *en banc* review. *See id.* §§ 46(b) and (c) (1988). For all practical purposes, therefore, the Special Division is, as it was intended to be, *see* H.R. REP. No. 1307, 95th Cong., 2d Sess. 12 (1978); 123 CONG. REC. 20,985–86 (1977), a "national" court whose activities have little or no relation to the "administration of justice" in the D.C. Circuit. That being the case, the Circuit Judicial Council arguably should have no administrative, and

[3] With respect to the Division's records and procedures, I note that the Senate Governmental Affairs Committee recently called on the Division, and *not* the Court of Appeals or Circuit Council, to promulgate "rules of procedure for practice before it, clarify available avenues of appellate review, and undertake to catalogue and preserve independent counsel reports and make public versions accessible upon request." S. REP. No. 101, 103d Cong., 2d Sess. 21 (1994), *reprinted in* 1994 U.S.C.C.A.N. 748, 766.

hence no disciplinary, authority over a member of the Special Division.

There is one significant wrinkle in this analysis. Even when acting in his capacity as a member of the Special Division, the judge who is the subject of the instant complaints may still be subject to disciplinary process in this circuit by virtue of his service as a judge of the Court of Appeals for the D.C. Circuit. The complaint procedure established by the Judicial Councils Act "applies to judges of the United States courts of appeals." D.C. CIR. JUD. MISCONDUCT R. 1(c). It is not limited to judges of this circuit only when they are performing work on behalf of the circuit. In other words, the statute appears to say that if a judge at any time engages in conduct that is prejudicial to the effective and expeditious administration of the business of the courts, a resulting charge of misconduct must be processed in the judge's "home" circuit. Indeed, if the subject judge's service on the Special Division is analogized to that of a judge who is "visiting" in another circuit, then it is clear that he is subject to the disciplinary authority of this, his home circuit. *See id.*, Commentary on Rule 1 ("This language is intended to make it clear that the circuit in which a judge holds office is the appropriate circuit in which to file a complaint.... Complaints against a visiting judge *from* this circuit should be filed here." (emphasis in original)).

In light of the language of the Rule and Commentary, and in view of the fact that the subject judge does not contest disciplinary jurisdiction in this circuit, I will assume, for the purposes of reviewing the pending complaints, that the Judicial Council for the District of Columbia Circuit has jurisdiction to consider this case.

III. DO THE COMPLAINTS ALLEGE CONDUCT PREJUDICIAL TO THE EFFECTIVE AND EXPEDITIOUS ADMINISTRATION OF THE BUSINESS OF THE COURTS?

The central question presented for review is whether complainants have alleged "conduct prejudicial to the effective and expeditious administration of the business of the courts."

The primary business of the courts of this circuit is, of course, the resolution of "cases or controversies" within the jurisdiction conferred by Article III of the Constitution. *See generally Flast v. Cohen*, 392 U.S. 83, 94–95 (1968) ("case or controversy" requirement defines and limits role of courts in "tripartite" allocation of powers, and guards against intrusion into areas committed to the other branches). The Special Division's authority to appoint an independent counsel arises not from Article III, however, but from the Appointments Clause of Article II, Section 2. *See Morrison v. Olson*, 487 U.S. 654, 673–79 (1988). If the "business of the courts" is viewed as the exercise of Article III judicial power, then the conduct of a member of the Special Division, at least with respect to the exercise of the Division's *appointment* power, is entirely unrelated to, and can have no *direct* prejudicial effect on, the administration of Article III "business."

The legislative history and scholarly comments on the Judicial Councils Act support the view that section 372(c) was not intended to reach all allegations of misconduct, even those unrelated to the exercise of judicial power. *See, e.g.*, S. REP. No. 362, 96th Cong., 1st Sess. 3 (1979), *reprinted in* 1980 U.S.C.C.A.N. 4315, 4317 (complaints of conduct "not connected with the judicial office" are "outside the scope of this legislation"); 125 CONG. REC. 30,064 (1979) (statement of Sen. Bayh) (extrajudicial behavior covered by Act only if it affects performance on the bench);[4] James R. Browning, *Evaluating Judicial Performance and Related Matters*, 90 F.R.D. 197, 204 (1981) (noting administrative "thrust" of Act, as distinguished from state disciplinary procedures aimed at "misconduct" or "conduct that brings the judicial office into disrepute"). Consistent with this narrow reading of the "prejudi-

[4] Both the Senate Report and Senator Bayh's remark refer to an early version of S. 1873, a bill that contained a judicial disciplinary structure, including a formal "Court on Judicial Conduct and Disability," much different from the one ultimately adopted in the Judicial Councils Act. The Senate bill contained an essentially identical, if not broader, substantive standard for discipline—conduct *inconsistent with* the effective and expeditious administration of the business of the courts. *See* Senate Report 362 at 31.

cial conduct" standard, a number of Chief Judges and Judicial Councils have dismissed complaints alleging misconduct not directly related to judicial activities (*e.g.*, comments by judges in speeches or newspaper interviews, participation in family members' legal actions, and perjury allegedly committed before taking the bench). *See* Richard L. Marcus, *Who Should Discipline Federal Judges, and How?*, 149 F.R.D. 375, 404–07 (1993) (citing dismissal orders).

It may be, however, that the "business of the courts" should be construed broadly enough to encompass the Special Division's administrative duties, which are, after all, conferred by a congressional grant of authority equal to, albeit separate from, the grant of Article III judicial power. *See Morrison*, 487 U.S. at 678–79. Alternatively, and more importantly, it is possible to interpret the statute to mean that the prejudicial conduct to which 28 U.S.C. § 372(c)(1) refers includes *any* conduct that adversely affects the administration of the business of the courts. Thus, if a judge engages in any misconduct, even in his or her private life, it may be within the scope of 28 U.S.C. § 372(c)(1) if the conduct has the proscribed effect. Indeed, the Court of Appeals of this circuit, in upholding the Judicial Councils Act against vagueness and overbreadth challenges, described the statutory standard as including "other conduct prejudicial to the administration of justice that brings the judicial office into disrepute." *Hastings v. Judicial Conf. of the United States*, 829 F.2d 91, 106 (D.C. Cir. 1987) (quoting Senate Report 362 at 9), *cert. denied*, 485 U.S. 1014 (1988). This suggests that conduct causing only an *indirect* effect on the courts' judicial function may be subject to discipline. *But see* Stephen B. Burbank, *Procedural Rulemaking under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283, 303 n.79 (1982) (noting deletion of "disrepute" language from S. 1873).

In the instant case, it is unnecessary to determine the breadth of the statutory standard in order to dispose of the pending complaints. For however broadly the statutory standard is to be read, complainants do not allege conduct by the subject judge that could have even an *indirect* prejudicial

effect on the administration of the business of the courts. Complainants' allegations, broadly referring to the "appearance of impropriety" and citing ethical strictures purportedly applicable to the judge's conduct, are grounded in a fundamental misunderstanding of the nature of the Special Division's authority.

The Supreme Court made clear in *Morrison*, 487 U.S. at 678–79, that, in considering and acting on an Attorney General's application for the appointment of an independent counsel, the Special Division is not exercising judicial power under Article III, but a species of Article II appointment power.[5] This power is, by its very nature, entrusted to the discretion of the appointing authority. *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 167 (1803) (Article II appointment power of the President). In an adversarial judicial proceeding under Article III, however, there are competing parties who present evidence in support of a legal claim; and a judge looks solely to the record and the applicable rules of law to decide the case. A judge in a judicial proceeding who reaches outside of the record to decide a case defiles the process. Even an "appearance of impropriety" is unacceptable in such a setting, so "judicial proceedings" are subject to stringent constitutional (*e.g.*, procedural due process), statutory (*e.g.*, the com-

[5] The Court in *Morrison* held as follows:

> [W]e do not think it impermissible for Congress to vest the power to appoint independent counsel in a specially created federal court. We thus disagree with the Court of Appeals' conclusion that there is an inherent incongruity about a court having the power to appoint prosecutorial officers....
>
> ....
>
> ... [O]nce it is accepted that the Appointments Clause gives Congress the power to vest the appointment of officials such as the independent counsel in the "courts of Law," there can be no Article III objection to the Special Division's exercise of that power, as the power itself derives from the Appointments Clause, a source of authority for judicial action that is independent of Article III.

487 U.S. at 676, 678–79 (footnotes omitted).

mands of the Administrative Procedure Act), and ethical (*e.g.*, the prohibition against *ex parte* contacts embodied in Canon 3(A)(4)) rules. These safeguards that are employed to ensure fairness in judicial proceedings are mostly irrelevant in connection with exercises of the appointment power.

The appointment functions of the Special Division certainly do not constitute adversarial proceedings. And in creating the Special Division, Congress recognized the difference between the appointment and judicial powers by making it clear that a judge who participates in the selection of an independent counsel while a member of the Special Division cannot thereafter participate in a judicial proceeding involving the independent counsel:

> [N]o member of [the Special Division] of the court who participated in a function conferred on the division ... involving an independent counsel shall be eligible to participate in any judicial proceeding concerning a matter which involves such independent counsel while such independent counsel is serving in that office or which involves the exercise of such independent counsel's official duties, regardless of whether such independent counsel is still serving in that office.

28 U.S.C. § 49(f).

It makes little sense to think that an authority acting pursuant to the Appointment Clause of Article II might be forbidden from consulting with others regarding candidates for appointment. It is hard to imagine how anyone would go about that task without seeking advice. Indeed, in the context of the President's exercise of the appointment power, the benefit of unfettered outside consultation is deemed so important that it may enjoy Constitutional protection. *See Washington Legal Found. v. United States Dep't of Justice*, 691 F. Supp. 483, 491–96 (D.D.C. 1988) (application of Federal Advisory Committee Act ("FACA") to Presidential use of ABA committee on judicial nominations unconstitutionally burdens appointment power), *aff'd on other grounds sub nom. Public Citizen v. United States Dep't of Justice*, 491 U.S. 440 (1989); *see also id.*, 491 U.S. at 482–89 (Kennedy, J., concurring in the judgment) ("[A]pplication of FACA would consti-

tute a direct and real interference with the President's exclusive responsibility to nominate federal judges.").

It is equally anomalous to regard a person who acts under the Appointments Clause as one with the authority to "adjudicate" claims (as is true under Article III). I do not mean to suggest that Congress could not, consistent with the Appointments Clause and the doctrine of separation of powers, place restrictions on the Special Division's ability to gather information to assist it in exercising its statutory authority; however, this possibility does not transform the appointment process of the Special Division into a "judicial proceeding" subject to rules meant to protect Article III adversary proceedings.

Complainants would doubtless argue that, whether or not the members of the Special Division are acting pursuant to Article II or Article III, the Ethics in Government Act *does* place restrictions on the authority of the Special Division. In complainants' view—a view that I recognize may be shared by some members of the public, the press, and even the legal community—the Ethics Act was intended to take the appointment process out of the world of partisan politics, "to insure that the selection would not be influenced by the very sort of political considerations that the Act was adopted to avoid." *See* Chesterfield Smith, et al., *Joint Statement Regarding Independent Counsel Selection Process* 1 (Sept. 20, 1994). This view has been endorsed by five former Presidents of the American Bar Association. *Id.*[6] It is noteworthy, however,

[6] Complainant in No. 94–8 submitted this document to me on October 18, 1994, together with a letter protesting delay in my disposition of the complaint. Noting that I "no doubt feel uncomfortable" reviewing the conduct of one of my colleagues, complainant urges me to appoint an investigating committee without further delay, thus relieving me of any further discomfort, and "eliminating any possible criticism that the matter was whitewashed at the preliminary stage by a single judge who is a colleague of the judge whose conduct is in question." Complainant's comments are inapposite, if not offensive. I received these complaints on September 16, 1994, the day after I became Chief Judge of the Circuit. Any delay in the completion of my review has resulted from my determi-

that neither the ABA Presidents' statement nor the complaints in this case cite any support for their reading of the Ethics Act. This is because there is nothing in the language or legislative history of the independent counsel provisions of the Act suggesting that the members of the Special Division are barred from consulting with others in the exercise of their appointment authority.

The Ethics Act, as amended, merely provides that the Special Division "shall appoint an appropriate independent counsel" upon receipt of an application from the Attorney General. 28 U.S.C. § 593(b)(1). The Act places few limits on the Division's discretion in selecting an "appropriate" counsel, requiring only that the appointee have "appropriate experience," be a person who will conduct her duties in a "prompt, responsible, and cost-effective manner," and "without undue delay." *Id.* § 593(b)(2). The one absolute qualification imposed by the Act is that the independent counsel may not be a "person who holds any office of profit or trust under the United States." *Id.*[7] The Act is utterly silent as to whether, or to what extent, the Special Division may solicit or consider the views of persons other than its own members.

The legislative history of the Ethics Act is similarly silent on this question, with one interesting exception. The Act provides that the Attorney General's application for appointment of an independent counsel "shall contain sufficient information to assist the division of the court in selecting an independent counsel and in defining that independent counsel's prosecutorial jurisdiction." 28 U.S.C. § 592(d). The

---

nation to address these matters with the thoroughness they deserve, while dealing with a number of other responsibilities of my office. And contrary to complainant's surmise, I am not at all "uncomfortable" with the responsibility of reviewing the conduct of a judicial colleague.

[7] This provision would have excluded Robert Fiske, the "regulatory" Whitewater independent counsel, from appointment pursuant to the Act, had not Congress, in the 1994 Reauthorization Act, expressly exempted him from exclusion. *See* Pub. L. No. 103–270, § 7(h), 108 Stat. at 738.

Senate Report on this provision expressly contemplates that the information provided may include "suggestions as to the names of individuals who would make good special prosecutors, which information would be of assistance to the division of the court." S. REP. No. 170, 95th Cong., 1st Sess. 56 (1977), *reprinted in* 1978 U.S.C.C.A.N. 4216, 4272. If "[t]he entire purpose of appointing a temporary special prosecutor is to get someone who is independent, both in reality and appearance, from the President and the Attorney General," *id.* at 65–66, *reprinted in* 1978 U.S.C.C.A.N. at 4281–82, it is unlikely that Congress would find "suggestions" from the Attorney General permissible, yet assume that the Special Division would otherwise insulate itself from outside influences unconnected with the President or his administration.

When it is kept in mind that the "entire purpose" of the independent counsel statute was to provide *independence from the Executive Branch*, it is easy to see that complainants' view of the appointment process as a cloistered, apolitical judicial "proceeding" is quite far-fetched. The legislative history of the Ethics Act shows a clear emphasis on establishing a prosecutorial office free of any conflict of interest that might arise where officials of the Executive Branch are called upon to investigate their colleagues or superiors. *See* Senate Report 170 at 5–7, *reprinted in* 1978 U.S.C.C.A.N. at 4221–23. In addition, Congress sought in the Ethics Act to protect the independent counsel from interference at the hands of Executive Branch officials, such as the premature dismissal experienced by Archibald Cox during his Watergate investigation. *See* House Report 1307 at 5 & n.10 (citing Watergate history, and quoting *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935) ("[O]ne who holds his office during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will.")). However, Congress has never expressed an intention to make the appointment process itself independent of all "nonjudicial" influences outside of the Executive Branch. This may be an *aspiration* that is now embraced by significant segments of society, but it finds no support in applicable constitutional, statutory, or ethical precepts.

Finally, it is not without significance that the Special Division's past practice, to which no prior objection seems to have been directed, is plainly inconsistent with complainants' view of the Division's proper role. According to a published description of the Special Division's appointment process (an account based on personal interviews with members of the Division and former independent counsel), Division members have routinely relied on consultations with and recommendations from judicial colleagues, former professional associates, and other members of the so-called "old-boy network." *See* KATY J. HARRIGER, INDEPENDENT JUSTICE: THE FEDERAL SPECIAL PROSECUTOR IN AMERICAN POLITICS 150–51 (1992). Even had the subject judge in this case discussed the pending application with his congressional friends and considered the submissions to the Division by other members of Congress,[8] he would have at most engaged in the same consultative process relied on by former members of the Special Division in connection with prior appointments. That those persons consulted might be political opponents of the President or his party should not expose the selection process to an anti-administration taint, any more than the Division's consideration of an Attorney General's recommendation should expose it to a charge of pro-administration partiality.

IV. CONCLUSION

Whether or not the conduct of a judge of the Special Division can ever have sufficient direct or indirect prejudicial

[8] Complainant in No. 94–8 also finds fault in the subject judge's failure to disclose the existence or contents of these letters until requested to do so by a representative of the press. The Act provides that the Special Division "*may* . . . allow the disclosure of any notification, application, or any other document, material, or memorandum supplied to the division of the court under this chapter." 28 U.S.C. § 593(g) (emphasis supplied). The Act does not appear to *require* the release of materials submitted to it. In any event, this is a matter of statutory construction for the Special Division; even if I disagreed with the Special Division's disposition, this would not be evidence of misconduct proscribed by the Judicial Councils Act.

effect on the administration of the business of the courts to warrant the exercise of the circuit's disciplinary authority, it is clear that no such conduct occurred in this case. There may be some members of society who would question the actions of the accused judge, for they have a pristine (albeit arguably naive) view of the appointment process. But this is irrelevant. The simple point here is that, even accepting the complaints as true for purposes of this analysis, the judge who has been accused in this case would have violated no provision of law or ethical Canon. There is no basis whatsoever for proceedings against this judge.

In sum, complainants have failed to allege conduct prejudicial to the effective and expeditious administration of the business of the courts. Accordingly, the complaints shall be dismissed for failure to conform to 28 U.S.C. § 372(c)(1).[9]

---

[9] Pursuant to 28 U.S.C. § 372(c)(10) (1988) and D.C. CIR. JUD. MISCONDUCT R. 5, complainants may file a petition for review by the Judicial Council for the District of Columbia Circuit. Any petition must be filed in the Office of the Clerk of the Court of Appeals within 30 days of the date of the Clerk's letter transmitting the dismissal Order and this Opinion. *Id.* R. 6(a).

9) **JUDICIAL COMPLAINT, dated September 1, 1994**

Judicial Council of the District of Columbia Circuit
Complaint of Judicial Misconduct or Disability

Mail this form to: Clerk, United States Court of Appeals for the
District of Columbia Circuit
United States Courthouse,
333 Constitution Avenue N.W.
Washington, D C. 20001-2866

Mark envelope "Complaint of Misconduct" or "Complaint of Disability." Do not put the name of the judge or magistrate on the envelope.

See Rule 2-for the number of copies required.

1. Complainant's Name: Francis T. Mandanici
Address: 180 Pearsall Place
Bridgeport, Ct. 06605

Daytime telephone: (203)789-7891

2. Judge or Magistrate complained about:

Name: David Sentelle
Court: United States Court of Appeals, District of Columbia Circuit

3. Does this complaint concern the behavior of the judge or magistrate in a particular lawsuit or lawsuits?

Yes X No

If "yes" give the following information about each lawsuit (use reverse side if there is more than one):

Court: Division For Purpose of Appointing Independent Counsel ,
Docket number: Division No. 94-1

Are (were) you a party or lawyer in the lawsuit?

Party Lawyer Neither X

If a party, give the following information:

Lawyer's Name:
Address:
Telephone: ( )

Docket number(s) of any appeals of above case(s) to the District of Columbia Circuit Court of Appeals:

4. Have you filed any lawsuits against the judge or magistrate?

Yes No X

If "yes" give the following information about each lawsuit (use the reverse side if there is more than one):

Court:
Docket Number:
Present status of suit:

Your Lawyer's Name:
Address:
Telephone: ( )

Court to which any appeal has been taken:
Docket number of the appeal:
Present status of the appeal:

5. The statute which governs the procedure for these complaints generally provides for confidentiality until such time as the complaint is finally processed.

6. On separate sheets of paper, not larger than the paper this form is printed on, describe the conduct or the evidence of disability that is the subject of this complaint. See rule 2(b) and rule 2(d). Do not use more than 5 pages (5 sides). Most complaints do not require that much.

7. You should either:

(l) check the first box below and sign this form in the presence of a notary public; or

(2) check the second box and sign the form. You do not need a notary public if you check the second box.

( ) I swear (affirm) that

(X) I declare under penalty of perjury that —

(l) I have read rules 1 and 2 of the Rules of the D.C. Circuit Governing Complaints of Judicial Misconduct or Disability

(2) The statements made in this complaint are true and correct to the best of my knowledge.

/s/ Francis T. Mandanici
(Signature)

Executed on September 1, 1994
(Date)

Judge David Sentelle is a judge of the United States Court of Appeals for the District of Columbia Circuit. According to press reports, Judge Sentelle has publicly stated that he and Senator Lauch Faircloth (R-NC) and Senator Jesse Helms (R-NC) are "old friends" whom he lunches with "from time to time". (Washington Post, hereafter referred to as WP, Aug. 12, 1994, PA24). According to press reports, Judge Sentelle and Senator Faircloth "share roots in North Carolina Republican politics". (WP, Aug. 12, 1994, PA1), and Judge Sentelle "was active in local Republican circles while a lawyer serving as the chairman of the Republican party in Mecklenburg County, N.C." (New York Times, hereinafter referred to as NYT, Aug. 9, 1994 PA14). Friends and critics of Judge Sentelle recall him as an "ideologically committed leader of the conservative wing of the Republican Party." (NYT, Aug. 17, 1994, PA1). Judge Sentelle was a "protege of Senator Jesse Helms" (NYT, Aug. 9, 1994, PA14), a "political ally of (Senator) Helms", "is close to conservative Sen. Jesse Helms ... (who) backed Sentelle's appointment to the appeals court." (WP, Aug. 7, 1994, pp A1, A6).

As a member of the Court of Appeals for the District of Columbia Circuit, Judge Sentelle was appointed to sit on the three judge panel entitled the Division For The Purpose Of Appointing Independent Counsel. On August 5, 1994, Judge Sentelle and the two other members of that panel named Kenneth Starr as the Independent Counsel to investigate what is commonly known as the Whitewater scandal involving the Madison Guaranty Savings and Loan. All three members of that panel decided to name Mr. Starr as the Independent Counsel rather than to keep Robert Fiske who Attorney General Janet Reno had earlier appointed as an Independent Counsel to investigate the matter. That appointment was made in January, 1994, pursuant to a Justice Department regulation which the Attorney General utilized since no independent counsel law was in effect at that time.

According to press reports, Senator Faircloth "led (the earlier) efforts to remove special counsel Robert B.Fiske ... (and had) condemned Fiske's early findings" (WP, Aug. 12, 1994, P A1) "which had generally pleased the (Democratic) White House". (NYT, Aug. 17, 1994, P B8). Prior to Fiske's removal, Senator Faircloth "wrote to Attorney General Janet Reno July 1 charging that Fiske's professional ties to former White House Counsel Bernard Nussbaum presented at least an apparent conflict of interest that rendered him unfit for the job. That letter was followed by a July 13 appeal to Sentelle from 10

conservative Republican congressman who asked that Fiske be replaced". (WP, Aug. 12, 1994, P A1). That appeal was in the form of a letter and Judge Sentelle recently "refused to comment ... on whether he had read the letters or what role - if any - they played in the panel decision", and when asked if the letters "were in the public court file", he refused to respond in an intelligent manner but rather told the inquirer that he "believed English was your mother tongue". (WP, Aug. 7, 1994, P A7). A search of the public file prior to August 7 did not disclose the letter. (WP, Aug. 7, 1994, P A7). A later press report of August 12, 1994 reveals that "(u)ntill this week, when news organizations appealed to Sentelle's panel, letters it received regarding Fiske -- including the congressional appeal -- were not included in a public court file". (WP, Aug. 12, 1994, P A24).

In addition to letters to Judge Sentelle which were not disclosed, press reports also reveal that Judge Sentelle confirmed that he had a previously undisclosed lunch with Senator Faircloth and Senator Helms in "mid July, a time when (he) was considering whether Fiske would be permanently appointed the independent counsel in the Whitewater case". (WP, Aug. 12, 1994, P A1). Judge Sentelle recently issued a written statement that to "the best of my recollection nothing in these discussions concerned independent counsel matters". (WP, Aug. 12, 1994, P A24). At the lunch, the three "old friends" talked about "western wear, old friends, and prostate problems". (WP, Aug. 12, 1994, P A24).

Based on the above media reports of facts which would probably be uncontested, I am requesting that a special committee be appointed pursuant to 28 U.S.C., Sec. 372(c)(1) and (4) to formally investigate whether Judge Sentelle has "engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts". There should be 1) an investigation of all ex parte communications including the communications to the panel and Judge Sentelle from the 10 Republican congressmen and others, and also between Judge Sentelle and Senator Faircloth and Senator Helms at their said lunch, and also why any such ex parte communications were not promptly disclosed on the public record; and 2) an investigation of the relationship between Judge Sentelle and his "old friend" Senator Faircloth who led the campaign to replace Fiske since that relationship should have required Judge Sentelle to recuse himself from the panel which decided to replace Fiske. If Judge Sentelle was close enough to Senator Faircloth to share personal details like

prostate problems with him over lunch, then he was close enough to Senator Faircloth to require recusal in a matter in which Senator Faircloth had a substantial personal and political interest.

Concerning the judicial complaint statute, 28 U.S.C., Sec. 372, the Court of Appeals For the District of Columbia Circuit has held that the "legislative history demonstrates that the Act ... was intended to include wilfull misconduct in office, willful and persistent failure to perform duties of the office, habitual intemperance, and other **conduct prejudicial to the administration of justice that brings the judicial office into disrepute".** Hastings Judicial Conference of U.S., 829 F2d 91, 106 (D.C. Cir., 1987)(emphasis added). The legislative history "further provided that the standard announced in the Act should be informed by the Code of Judicial Conduct of the American Bar Association, as approved by the Judicial Conference; resolutions of the Conference relating to judicial conduct; and congressional enactments concerning judicial conduct". Id.

Canon 3 of the Code of Judicial Conduct of the American Bar Association states that a "judge should ... neither initiate nor consider ex parte communications concerning a pending or impending proceeding". Canon 3(4). "The proscription against communictions concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding ..." Canon 3(4), Commentary. The letters to Judge Sentelle and the panel constituted an ex parte communication concerning the proceeding to keep or replace Fiske as the Independent Counsel.

More importantly such ex parte communications should have been immediately made public and placed in the public record. It was only due to pressure from the press that the letters were made public. A "second reason supports the prohibition against judges' allowing themselves to be the object of ex parte communications; the fact that a judge has entertained an unfair communication from one party **without immediately stopping the communication and divulging the fact to all interested parties intimates that the judge is prejudiced in favor of the communicating side** in a way that may influence the ultimate outcome of the case. Ex parte communication may therefore be thought to impugn the judge's required neutrality". Modern Legal Ethics, by Charles W. Wolfram, West Publishing Co., 1986, p. 1004 (emphasis

added). **"Ex parte communications ... suggest bias or partiality on the part of the judge".** Judicial Conduct and Ethics, by Jeffrey Shaman, Steven Lubet, and James Alfini, The Michie Company, p. 149. (emphasis added). The undisclosed ex parte communications between Judge Sentelle and others were not only improper but if they were accepted and undisclosed then that shows a bias on part of Judge Sentelle in favor of the views expressed in, and the people who made, such communications.

Concerning the second issue of recusal, the A.B.A. Code of Judicial Conduct and a federal statute both require recusal when a judge's "impartiality might reasonably be questioned." As mentioned earlier, the legislative history of the statute upon which this complaint is based incorporates the A.B.A. Canons and the federal statutes on judicial conduct. Hastings v Judicial Conference of U.S., supra. The A.B.A. Code of Judicial Conduct states that a "judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned ..." Canon 3C. Congress has enacted a statute which states that "(a)ny justice, judge, or magistrate of the United States shall disqualify himself in any proceedings in which his partiality might reasonably be questioned". 28 U.S.C., Sec. 455(a).

It will no doubt be argued that the rules on recusal were not intended to make judges cut off their social contacts with their old political friends. However,

> "the judicial code insists that a full-time judge arrange his or her affairs to remove most economic and political entanglements that might impair the judge's objectivity. The rearranging that can be required may be substantial and may require such wrenching steps that a judicial candidate may decide that the sacrifices are too great to warrant accepting a judgeship ... Although persons who become judges have often followed an intensely political route to the office, once on the bench, the new judge must eschew most political connections beyond voting." Modern Legal Ethics, supra, 981, 986.

Not only must a judge eschew his or her political connections, but it is even more important that a judge recuse himself or herself from cases involving such political connections. The United States Supreme Court has held that the purpose of the recusal statute

"is to avoid even the appearance of partiality. If it would appear to a **reasonable person** that a judge has ... an interest in the litigation then an appearance of partiality is created even though no actual partiality exists ... because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible ... We must continuously bear in mind that to perform its high function in the best way justice must satisfy the appearance of justice ... The very purpose of Section 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible". Liljeberg v. Health Services Acquisition Corp. 486 U.S. 847, 860, 864, 865, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988) (empahasis added).

In Liljeberg, the Supreme Court held that the judge should have vacated a prior judgment because he sat as a trustee of a university which was not a party to the action but which "had an interest in the litigation". Id, 861 850. The Supreme Court held that the judgment should be vacated because although the trial judge "did not have actual knowledge of (the university's) interest in the dispute" when the case was tried and decided, Id, 864, he should have granted a post trial motion to vacate the judgment filed by the losing party when it learned of the judge's interest. The Supreme Court also held that the judge "should have recused himself (earlier) when he obtained actual knowledge of that interest" soon after he entered formal judgment but long before the losing party first learned of the judge's interest. Id, 858, 866-869. A "judge has an **independent duty** to disqualify himself in any proceeding in which his impartiality might be questioned". U.S. v Ferguson 550 F. Supp. 1256, 1259 (D.C.N.Y., 1982) (emphasis added). "(S)ection 455 is to be **instigated sua sponte** by the judge ..." State of Idaho v Freeman 507, F. Supp. 706, 722 (D.C. Idaho, 1981) (emphasis added).

Thus Judge Sentelle should have not only recused himself in the proceeding concerning whether to replace Fiske, but even if he discovered Senator Faircloth's interest in the Fiske matter only after Fiske was replaced, Judge Sentelle should have sua sponte rescinded the Fiske decision, reopened the matter and then recused himself.

However, although one of the issues in this complaint concerns recusal, there was no formal ruling on recusal nor was

there a procedure by which anyone interested in the matter could move to disqualify Judge Sentelle. None of the people who will be investigated by Mr. Starr were parties or involved in the proceeding where Mr. Starr was chosen. Thus Rule 1(e) of the Rules Of The Judicial Council Governing Complaints Of Judicial Misconduct is not applicable. That rule basically states that this outside complaint procedure cannot be used in lieu of a normal in court motion to disqualify a judge. The rule states that the "complaint procedure may not be used to have a judge disqualified from sitting on a particular case. A motion for disqualification should be made in the case". Since there was no previous option to made such a "motion for disqualification" concerning Judge Sentelle which could have been exercised by anyone interested in the matter, then Rule 1(e) cannot be used to dismiss this complaint.

Also, this complaint cannot be dismissed under 28 U.S.C., Sec. 372(c)(3)(A)(ii) which states that a complaint can be dismissed if it is "directly related to the merits of a decision or procedural ruling". This rule is not applicable to the present complaint since Judge Sentelle and the panel never made any formal decision or ruling on the ex parte communications issue or the recusal issue. Thus this present complaint about such issues is not directly related to the merits of any formal decision or procedural ruling. Furthermore, this complaint is not about the merits of the formal decision to replace Fiske since that decision, although questionable, could survive on the merits.

The action sought by this complaint is obviously not a court order that Judge Sentelle reopen the Fiske-Starr matter since the Judicial Council does not have the power to enter that order. Rather, pursuant to 28 U.S.C., Sec. 372(c)(6) (B), the Judicial Counsel should 1) ask Judge Sentelle to "voluntarily retire" from the panel concerning independent counsels, 2) order that no further cases be assigned to Judge Sentelle for a certain period of time, 3) publicly censure or reprimand Judge Sentelle.

Prior to the above action being taken, a special committee should be appointed to fully investigate the matter pursuant to 28 U.S.C., Sec. 372 (c)(4). That committee should not only interview Judge Sentelle but anyone who wrote to or communicated with the panel on the Fiske matter. The inquiry should cover when such communications were received, who read or listened to such communications, where were such communications kept and by whom, when were such communications placed in the public record or file, who made

the decision to place the communications in the public record, and why weren't the communications promptly made public when they were received. Senator Helms and Senator Faircloth should provide a full accounting of not only what was said at the lunch but what was said prior to the lunch between them; and between them and others, regarding the purpose of the lunch. There should be an inquiry as to who initiated the lunch, and on what approximate dates within the past 3 years did any of the two senators have lunch or meet with Judge Sentelle. If neither of the two Senators had lunch with Judge Sentelle within the past 3 years, then the lunch they had in mid May had a purpose. Although Judge Sentelle has stated that there was an old friendship between him and Senator Faircloth which made it natural for them to have lunch together in mid May, a recent investigative report suggests that the two men had "little in common" between them, and that perhaps it was really not an "old friendship that ... brought them together ... in the Senate Dining Room" but rather it was Senator Helms who was "the glue that may have brought them together." (WP, Aug. 24, 1994, P A3).Since Senator Helms was the primary sponsor of Judge Sentelle's judgship, then there should be an inquiry as to whether the purpose of the lunch was to have Senator Helms' mere presence give a visual reminder to Judge Sentelle that the person who supported his judgeship also supported Senator Faircloth and his conservative agenda which included replacing Fiske. There should be an investigation of the full extent of the friendship between Judge Sentelle and Senators Faircloth and Helms, and when and to what extent did Judge Sentelle learn of their interest in replacing Fiske.

/s/ Francis T. Mandanici
Francis T. Mandanici

10) SUPPLEMENT TO COMPLAINT, dated October 17, 1994

FRANCIS T. MANDANICI
ATTORNEY AT LAW
Residence:
180 Pearsall Place
Bridgeport, CT 06605
(203) 368-1775

October 17, 1994

The Honorable Harry T. Edwards
United States Court of Appeals
District of Columbia Circuit
United States Courthouse
333 Constitution Ave., N.W.
Washington, D.C. 20001-2866

Re: Judicial Complaint No. 94-08

Dear Judge Edwards:

With reference to my above Complaint concerning Judge David Sentelle, please find enclosed a copy of a joint statement by five past presidents of the American Bar Association concerning the very same matter as my Complaint. Also enclosed is a copy of a Washington Post article concerning the statement. The A.B.A. past presidents stated that as lawyers "devoted to the rule of law", they were "concerned over the possibility that, as reported in the press, political considerations may have influenced the decision of the Special Court to replace Robert Fiske with Kenneth Starr as the independent counsel to investigate the so called Whitewater matter." The A.B.A. past presidents also stated that an informal meeting between a "member of the Special Court", referring to Judge Sentelle, and a member of Congress, referring to Senator Lauch Faircloth, "gives rise to the appearance of impropriety." The A.B.A. past presidents also stated that the "circumstances...created doubts about the fairness and objectivity of the selection process" in which Fiske was replaced by Starr.

The same concerns prompted me to file my Complaint seeking an investigation as to whether political considerations affected the decision to replace Fiske with Starr. Considering the importance of the matter as evidenced by numberous articles

in the national media and the public proclamation of such distinguished lawyers as five past presidents of the A.B.A., there should be a formal investigation by a special committee of judges pursuant to 28 U.S.C., Sec. 372(c) (4) and local rule 4(e). Such an important matter requires more than a "limited inquiry" by you to fashion an "informal solution". See local Rule 4 and Commentary on Rule 4.

Furthermore, local Rule 4(b) states that you should "not undertake to make findings of fact about any matter that is reasonably in dispute". Therefore, the matter can not be resolved by merely accepting the word of your colleague Judge Sentelle that nothing improper occurred. Even if a judge "denies that the event occurred", any situation in which a "factual question...is reasonably in dispute" requires the appoitntment of a special committee unless the allegations are "wholly implausible". See Commentary On Rule 4, par. (4).

Furthermore, in light of the general principles set forth in Liljeberg v. Health Services Acquisiton Corp., 486 U.S. 847 (1988), you no doubt feel uncomfortable conducting an initial review of a matter involving your colleague Judge Sentelle, especially since the Complaint against Judge Sentelle concerns his failure to recuse himself when he had a conflict of interest. However, although you are required as chief judge to make an initial review of the matter, you can allow a decision on the merits to be made by other judges who do not know Judge Sentelle as well if you appoint a special committee of judges who have never worked with Judge Sentelle. Also, you can appoint as the presiding officer of the committee a judge who does not know Judge Sentelle. See local Rule 9. By appointing such a special committe including a presiding officer different than yourself, you will be eliminating any possible criticism that the matter was whitewashed at the preliminary stage by a single judge who is a colleague of the judge whose conduct is in question.

Furthermore, it is important that there be no further delay in the appointment of the special committee. The law states that you should "expeditiously" review the Complaint and if you do not dismiss it then you should "promptly" appoint a special committee of judges to conduct a formal investigation. 28 U.S.C., Sec. 372(c)(3), (4). The Complaint was filed over six weeks ago on September 2, 1994, and that six week period certainly appears to be more than a "reasonable time" for Judge Sentelle to file a response and also for you to decide whether "appropriate corrective action has been taken or that action on

the complaint is no longer necessary because of intervening events." 28 U.S.C., Sec. 372 (c)(3)(B), local Rule 4(e). Since there has been no corrective action taken nor any change in the status quo, then obviously the matter should now be referred to a special committee of judges. As the A.B.A. past presidents proclaimed, "the people must be assured that their officials are subject to the rule of law -- that they are under the law and not above the law." Since one rule of law is that justice delayed is justice denied, then any further delay in appointing a special committee would only weaken the public's confidence in the rule of law.

Also pursuant to 28 U.S.C., Sec. 372(c) (4) would you please provide me with "written notice" regarding the appointment of a special committee.

Sincerely,

/s/ Francis T. Mandanici
Francis T. Mandanici

cc: Judge David Sentelle

JOINT STATEMENT REGARDING INDEPENDENT COUNSEL SELECTION PROCESS dated September 20, 1994

As former presidents of the American Bar Association, we are devoted to the rule of law. Because of that devotion, we make this joint statement because we are concerned over the possibility that, as reported in the press, political considerations may have influenced the decision of the Special Court to replace Robert Fiske with Kenneth Starr as the independent counsel to investigate the so-called Whitewater matter.

The Independent Counsel Act was adopted to ensure that the investigation and possible prosecution of high government officials was taken out of the arena of politics and handled on the merits by an independent and objective counsel. The American Bar Association has consistently supported the Act as essential to maintaining the public's trust in government -- the people must be assured that their officials are subject to the rule of law -- that they are under the law and not above the law.

To preserve the salutary principle of the Act, the selection of the independent counsel is placed in the judiciary. This was done to insure that the selection would not be influenced by the very sort of political considerations that the Act was adopted to avoid. Yet that is what apparently happened in the selection process here, according to press stories. Thus, it has been reported in the national media that several members of Congress wrote to the Special Court urging that Mr. Fiske be replaced, and, thereafter at least one of them met informally with a member of the Special Court while the matter of the selection was pending before the Court. This was unfortunate, to say the least. Whether or not Mr. Fiske's replacement by Mr. Starr was discussed, the meeting gives rise to the appearance of impropriety and the public is left in doubt.

We have the highest respect for Mr. Fiske and Mr. Starr. Both are lawyers of great ability, both have impeccable reputations for integrity, and both have had distinguished careers of public service. They each deserve better than to be left with a public impresson that the termination of Mr. Fiske and the selection of Mr. Starr were influenced by political considerations. Yet that is what appears from the circumstances, and that is why a recent New York Times editorial called on Mr. Starr to withdraw.

We do not join in that call because we have the utmost confidence in Mr. Starr's integrity and objectivity. Our concern remains with the circumstances that have created doubts about the fairness and objectivity of the selection process in this case. The Special Court must make sure in the future that its selections of independent counsel are not just objective, but also appear to be objective, and to be made without regard to political considerations. Nothing less will satisfy the public's trust. Nothing less will carry out the salutary principle of the rule of law that the Independent Counsel Act seeks to protect.

Chesterfield Smith, Lakeland, FL, ABA President 1973-74
Wm. Reece Smith, Jr., Tampa, FL, ABA President 1980-81
Robert MacCRate, New York, NY, ABA President 1987-88
Robert D. Raven, San Francisco, CA, ABA President 1988-89
John J. Curtin, Jr., Boston, MA, ABA President 1990-91

11) **PETITION FOR REVIEW, DATED NOVEMBER 29, 1994**

FRANCIS T. MANDANICI
ATTORNEY AT LAW
Residence:
180 Pearsall Place
Bridgeport, Ct. 06605
(203) 368-1775

November 29, 1994

Clerk
United States Court of Appeals
U.S. Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2866

Re: PETITION FOR REVIEW
JUDICIAL COUNCIL COMPLAINT NO. 94-8

Dear Sir:

I hereby petition the Judicial Council for review of the chief judge's order concerning Judicial Council Complaint No. 94-8 involving Judge David Sentelle. My original Complaint raised two issues but unfortunately the 16 page decision of Chief Judge Harry T. Edwards, dated November 1, 1994, fails to address the second but most important issue. The first part of my original Complaint charges that Judge Sentelle had an ex parte communication with Senator Lauch Faircloth (R-NC) and Senator Jesse Helms (R-NC) which was improper because Senator Faircloth led the efforts to remove the Whitewater Independent Counsel Robert Fiske and at the time of the ex part'e communication Judge Sentelle was a member of the 3 judge panel which was considering firing Fiske.

Judge Edwards in his decision held it was "naive" (p. 16) to think that Judge Sentelle could not have lunch with Senator Faircloth and Senator Helms to discuss the firing of Fiske since Judge Sentelle was acting in an "administrative" capacity rather than a judicial capacity when he later fired Fiske. The decision (pp. 8-11) states that a judge acting in an administrative capacity can have ex parte communications and such ex parte communications do not violate the Code of Judicial Conduct of the American Bar Association.

However, Canon 3B(4) of the Code of Judicial Conduct concerns "Administrative Responsibilities" and states that a judge acting in such an administrative capacity "should not make unnecessary appointments. He should exercise his power of appointment only on the basis of merit, **avoiding** nepotism and **favoritism.**" (emphasis added). Judge Sentelle told the press that he and Senators Faircloth and Helms were "old friends" whom he lunches with "from time to time." (See Complaint, p.1)

However, Judge Edwards did not conduct a factual inquiry as to what occurred between the old friends at the lunch they had just prior to Sentelle's decision to fire Fiske. Such an inquiry could have revealed that there was subtle pressure on Sentelle to fire Fiske who was not a favorite of Senators Helms and Faircloth and to replace him with a favorite of the Senators. Then again, considering Senator Helms' recent comments on President Clinton, perhaps he was not so subtle with his old friend Judge Sentelle.

Although the original Complaint specifically referred to the ethical canons against ex parte communications and did not specifically refer to the canons against favoritism, the thrust of the Complaint concerning the lunch issue was that such a lunch with Fiske's adversaries brought Judge Sentelle's "judicial office into disrepute." (See Complaint, p.2. citing Hastings v. Judicial Conference of U.S. 829 F2d 91, 106 (D.C. Cir., 1987). That now famous lunch has certainly brought Judge Sentelle as well as Judge Edwards into disrepute as evidenced by the enclosed editorial in the New York Times which states that the "behavior of Judge David Sentelle . . . was bad in itself. But the justification for that behavior offered up by Chief Judge Harry Edwards of the U.S. Court of Appeals is equally appalling." Since the lunch has so clearly brought the "judicial office into disrepute", then Judge Edwards should not have dismissed the Complaint and this Petition should be granted.

More importantly and perhaps more unfortunately, Judge Edwards refused to address the second but most important issue in the Complaint concerning recusal (pp. 3-5). The Complaint states that Judge Sentelle admitted that he and Senators Helms and Faircloth were "old friends" (p.1). and that it was reported in the press that Senator Faircloth "led (the earlier) efforts to remove special counsel Robert Fiske." (p.1) Based on that relationship, the Complaint charges that Judge Sentelle should have removed himself from the decision on whether to remove Fiske (p.2) since the Code of Judicial Conduct and a

federal statute requires all judges to "disqualify (themselves) in any proceeding in which (their) impartiality might reasonably be questioned." (p.3).

The Complaint referred to Canon 3C of the Code of Judicial Conduct which applies the above rule on disqualification to judges regardless of whether they are acting in an adjudicative or administrative capacity. Canon 3 is divided into 3 parts, with the first part covering "A. Adjudicative Responsibilities", the second part covering "B. Administrative Responsibilities", and the third part covering "C. Disqualification" and containing the above rule requiring judges to disqualify themselves when their impartiality might reasonably be questioned. Thus the disqualification section obviously applies to the previous two sections and covers what Judge Edwards described as the "administrative" act which occurs when a member of the Special Division appoints an Independent Counsel (see Decision, p. 9).

Regarding the federal statute on disqualification, 28 U.S.C. Sec. 455(a) mentioned in the original Complaint, p.3., that statute similarly states that all judges should "disqualify (themselves) in any proceeding in which (their) impartiality might reasonably be questioned." By way of example, the statute, Sec. (d)(l), states that the phrase "proceeding includes pretrial, trial, appellate review or other stages of litigation." It is important to note that "the term 'including' is not one of all encumbracing definition, but connotes simply an illustrative application of the general principle." Federal Land Bank Of St. Paul v. Bismark Lumber Co., 314 U.S. 95, 99-100, 62 S. Ct. 1, 86 L. Ed. 65 (1941) "It has been said that the word 'includes' is usually a term of enlargement, and not of limitation. It, therefore, conveys the conclusion that there are other items includable, though not specifically enumerated." Federal Election Commission v. Mass. Citizens For Life, 769 F2d 13, 17 (CAl, 1985).

Thus the disqualification statute requires judges to disqualify themselves in all proceedings in which their impartiality might be reasonably questioned and there is no exception to the rule which allows judges to ignore that rule when they are acting in an administrative rather than adjudicative capacity. Therefore, if Judge Edwards had addressed the disqualification issue, he would not have been able to wring an exception out of it which allows judges to make an administrative decision to appoint an Independent Counsel in a situation where they have a conflict of interest.

Rather than facing the disqualification issue which might require an even more "appalling" and more embarrassing legal analysis than that offered to cover the first issue, Judge Edwards abruptly ended his decision by calling myself "naive" and by being "rude" and giving a "condescending lecture in constitutional law." (See enclosed New York Times editorial). That condescending lecture certainly does not address the concerns expressed by five past presidents of the American Bar Association who previously publicly stated that the situation "gives rise to the appearance of impropriety", "created doubts about the fairness and objectivity of the selection process", and that "the people must be assured that their officials are subject to the rule of the law-that they are under the law and not above the law." (See my letter to Judge Edwards dated October 17, 1994).

Judge Edwards should not have dismissed the Complaint and this Petition should be granted regarding the disqualification issue because Judge Sentelle's failure to recuse himself brings the "judicial office into disrepute", see Hastings v. Judicial Conference, supra. Also Judge Edwards' decision not only fails to address the recusal issue but that failure similarly leaves the judicial office in disrepute. Judge Edwards' refusal to address the disqualification issue gives the clear message that judges can ignore the law by merely dodging legal issues and giving condescending lectures to the lower masses. Judge Edwards' decision on the first issue and his non decision on the second issue are equally appalling.

Therefore, this Judicial Council should grant this Petition and pursuant to 28 U.S.C., Sec. 372 (c)(6)(B), this Judicial Council should ultimately 1) ask Judge Sentelle to "voluntarily retire" from the panel concerning independent counsels, 2) order that no further cases be assigned to Judge Sentelle for a certain period of time, 3) publicly censure or reprimand Judge Sentelle.

Sincerely,

/s/ Francis T.Mandanici
Francis T. Mandanici

cc: Judge David Sentelle

12) ALL WRITS ACT , 28 U.S.C., Sec. 1651

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

13) JUDICIAL CONDUCT AND DISABILITY ACT, 28 U.S.C., SEC. 372

****

(c)(1) Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge or magistrate is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct. In the interests of the effective and expeditious administration of the business of the courts and on the basis of information available to the chief judge of the circuit, the chief judge may, by written order stating reasons therefore, identify a complaint for purposes of this subsection and thereby dispense with filing of a written complaint.

(2) Upon receipt of a complaint filed under paragraph (1) of this subsection, the clerk shall promptly transmit such complaint to the chief judge of the circuit, or if the conduct complained of is that of the chief judge, to that circuit judge in regular active service next senior in date of commission (hereafter, for purposes of this subsection only, included in the term "chief judge"). The clerk shall simultaneously transmit a copy of the complaint to the judge or magistrate whose conduct is the subject of the complaint.

(3) After expeditiously reviewing a complaint, the chief judge, by written order stating his reasons, may

(A) dismiss the complaint, if he finds it to be (i) not in conformity with paragraph (1) of this subsection, (ii) directly related to the merits of a decision or procedural ruling, or (iii) frivolous; or

(B) conclude the proceeding if he finds that appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events.

The chief judge shall transmit copies of his written order to the complainant and to the judge or magistrate whose conduct is the subject of the complaint.

(4) If the chief judge does not enter an order under paragraph (3) of this subsection, such judge shall promptly -

(A) appoint himself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint;

(B) certify the complaint and any other documents pertaining thereto to each member of such committee; and

(C) provide written notice to the complainant and the judge or magistrate whose conduct is the subject of the complaint of the action taken under this paragraph.

A judge appointed to a special committee under this paragraph may continue to serve on that committee after becoming a senior judge or in the case of the chief judge of the circuit, after his or her term as chief judge terminates under subsection (a)(3) or (c) of section 45 of this title. If a judge appointed to a committee under this paragraph dies, or retires from office under section 371(a) of this title, while serving on the committee, the chief judge of the circuit may appoint another circuit or district judge, as the case may be, to the committee.

(5) Each committee appointed under paragraph (4) of this subsection shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the judicial council of the circuit. Such report shall present both the findings of the investigation and the committee's recommendations for necessary and apropriate action by the judicial council of the circuit.

(6) Upon receipt of a report filed under paragraph (5) of this subsection, the judicial council -

(A) may conduct any additional investigation which it considers to be necessary;

(B) shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit, including, but not limited to, any of the following actions:

(i) directing the chief judge of the district of the magistrate whose conduct is the subject of the complaint to take such action as the judicial council considers appropriate;

(ii) certifying disability of a judge appointed to hold office during good behavior whose conduct is the subject of the complaint, pursuant to the procedures and standards provided under subsection (b) of this section;

(iii) requesting that any such judge appointed to hold office during good behavior voluntarily retire, with the provision that the length of service requirements under section 371 of this title shall not apply;

(iv) ordering that on a temporary basis for a time certain, no further cases be assigned to any judge or magistrate whose conduct is the subject of a complaint;

(v) censuring or reprimanding such judge or magistrate by means of private communication;

(vi) censuring or reprimanding such judge or magistrate by means of public announcement; or

(vii) ordering such other action as it considers appropriate under the circumstances, except that (1) in no circumstances may the council order removal from office of any judge appointed to hold office during good behavior, and (2) any removal of a magistrate shall be in accordance with section 631 of this title and any removal of a bankruptcy judge shall be in accordance with section 152 of this title;

(C) may dismiss the complaint; and

(D) shall immediately provide written notice to the complainant and to such judge or magistrate of the action taken under this paragraph.

(7)(A) In addition to the authority granted under paragraph (6) of this subsection, the judicial council may, in its discretion, refer any complaint under this subsection, together with the record of any associated proceedings and its recommendations for appropriate action, to the Judicial Conference of the United States.

(B) In any case in which the judicial council determines, on the basis of a complaint and an investigation under this subsection, or on the basis of information otherwise avaible to the council, that a judge appointed to hold office during good behavior may have engaged in conduct.

(i) which might constitute one or more grounds for impeachment under article II of the Constitution, or

(ii) which in the interest of justice, is not amenable to resolution by the judicial council,

the judicial council shall promptly certify such determination, together with any complaint and a record of any associated proceedings, to the Judicial Conference of the United States.

(C) A judicial council acting under authority of this paragraph shall, unless contrary to the interests of justice, immediately submit written notice to the complanant and to the judge or magistrate whose conduct is the subject of the action taken under this paragraph.

(8)(A) Upon referral or certification of any matter under paragraph (7) of this subsection, the Judicial Conference, after consideration of the prior proceedings and such additional investigation as it considers appropriate, shall by majority vote take such action, as described in paragraph (6) (B) of this subsection, as it considers appropriate. If the Judicial Conference concurs in the determination of the council, or makes its own determination, that consideration of impeachment may be warranted, it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary. Upon receipt of the determination and record of proceedings in the House of Representatives, the Clerk of the House of Representatives shall make available to the public the determination and any reasons for the determination.

(B) If a judge or magistrate has been convicted of a felony and has exhausted all means of obtaining direct review of the conviction, or the time for seeking further direct review of the conviction has passed and no such review has been sought, the Judicial Conference may, by majority vote and without referral or certification under paragraph (7), transmit to the House of Representatives a determination that consideration of impeachment may be warranted, together with appropriate court records, for whatever action the House of Reprsentatives considers to be necessary.

(9)(A) In conducting any investigation under this subsection, the judicial council, or a special committee appointed under paragraph (4) of this subsection, shall have full subpoena powers as provided in section 332(d) of this title.

(B) In conducting any investigation under this subsection, the Judicial Conference,or a standing committee appointed by the Chief Justice under section 331 of this title, shall have full subpoena powers as provided in that section.

(10) A complainant, judge, or magistrate aggrieved by a final order of the chief judge under paragraph (3) of this subsection may petition the judicial council for review thereof. A complainant, judge, or magistrate aggrieved by an action of the judicial council under paragraph (6) of this subsection may petition the Judicial Conference of the United States for review thereof. The Judicial Conference, or the standing committee established under section 331 of this title, may grant a petition filed by a complainant, judge, or magistrate under this paragraph. Except as expressly provided in this paragraph, all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

(11) Each judicial council and the Judicial Conference may prescribe such rules for the conduct of proceedings under this subsection, including the processing of petitions for review, as each considers to be appropriate. Such rules shall contain provisions requiring that-

(A) adequate prior notice of any investigation be given in writing to the judge or magistrate whose conduct is the subject of the complaint;

(B) the judge or magistrate whose conduct is the subject of the complaint be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing and;

(C) the complanant be afforded an opportunity to appear at proceedings conducted by the investigating panel, if the panel concludes that the complainant could offer substantial information.

Any such rule shall be made or amended only after giving appropriate public notice and an opportunity for comment. Any rule promulgated under this subsection shall be a matter of public record, and any such rule promulgated by a judicial council may be modified by the Judicial Conference. No rule promulgated under this subsection may limit the period of time within which a person may file a complaint under this subsection.

(12) No judge or magistrate whose conduct is the subject of an investigation under this subsection shall serve upon a special committee appointed under paragraph (4) of this subsection, upon a judicial council, upon the Judicial Conference, or upon the standing committee established under section 331 of this title, until all related proceedings under this subsection have been finally terminated.

(13) No person shall be granted the right to intervene or to appear as amicus curiae in any proceeding before a judicial council or the Judicial Conference under this subsection.

(14) Except as provided in paragraph (8), all papers, documents, and records of proceedings related to investigations conducted under this subsection shall be confidential and shall not be disclosed by any person in any proceeding except to the extent that

(A) the judical council of the circuit in its discretion releases a copy of a report of a special investigative committee under paragraph (5) to the complainant whose complaint initiated the investigation by that special committee and to the judge or magistrate whose conduct is the subject of the complaint;

(B) the judicial council of the circuit, the Judicial Conference of the United States, or the Senate or the House of Representatives by resolution, releases any such material which is believed necessary to an impeachment investigation or trial of a judge under article I of the Constitution; or

(C) such disclosue is authorized in writing by the judge or magistrate who is the subject of the complaint and by the chief judge of the circuit, the Chief Justice, or the chairman of the standing committee established under section 331 of this title.

(15) Each written order to implement any action under paragraph (6) (B) of this subsection, which is issued by a judicial council, the Judicial Conference, or the standing committee established under section 331 of this title, shall be made available to the public through the appropriate clerk's office of the court of appeals for the circuit. Unless contrary to the interests of justice, each such order issued under this paragraph shall be accompanied by written reasons thereof.

(16) Upon the request of a judge or magistrate whose conduct is the subject of a complaint under this subsection, the judicial council may, if the complaint has been finally dismissed under paragraph (6)(C), recommend that the Director of the Administrative Office of the United States Courts award reimbursement, from funds appropriated to the Federal judiciary, for those reasonable expenses, including attorneys' fees, incurred by that judge or magistrate during the investigation which would not have been incurred but for the requirements of this subsection.

(17) Except as expressly provided in this subsection, nothing in this subsection shall be construed to affect any other provision of this title, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, or the Federal Rules of Evidence.

(18) The United States Court of Federal Claims, the Court of International Trade, and the Court of Appeals for the Federal Circuit shall each prescribe rules, consistent with the foregoing provisions of this subsection, establishing procedures for the filing of complaints with respect to the conduct of any judge of such court and for the investigation and resolution of such complaints. In investigating and taking action with respect to any such complaint, each such court shall have the powers granted to a judicial council under this subsection.

14) RECUSAL STATUTE, 28 U.S.C., Sec. 455

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

****

(d) for the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

****

15) AMERICAN BAR ASSOCIATION CODE OF JUDICIAL CONDUCT

CANON 3

A Judge Should Perform the Duties of His Office Impartially and Diligently

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities

(1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public, clamor, or fear of criticism.

******

(4) A judge should accord to every person who is legally interested in a proceeding or his lawyer, full right to be heard according to law, and except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

* * * * * *

B. Administrative Responsibilities.

* * * * * *

(4) A judge should not make unnecessary appointments. He should exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism. He should not approve compensation of appointees beyond the fair value of services rendered.

* * * * * *

C. Disqualification.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

* * * * * *